1-293

TRANSCRIPT AS STIPULATED.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. ~~484.~~ 203

JAMES M. VEACH, ROBERT L. ROGERS, A. C. TRIMBLE, W. I. BENHAM, JOHN J. HOWARD, AND A. W. MITCHELL, APPELLANTS,

vs.

ADA S. RICE, MARY L. SPENCER, NAPOLEON B. TUMLIN, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

FILED NOVEMBER 25, 1885.

accession 2891

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 484.

JAMES M. VEACH, ROBERT L. ROGERS, A. C. TRIMBLE, W. I. BENHAM, JOHN J. HOWARD, AND A. W. MITCHELL, APPELLANTS,

vs.

ADA S. RICE, MARY L. SPENCER, NAPOLEON B. TUMLIN, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

INDEX.

	Original.	Print.
Bill of complaint	1	1
Exhibit A—Bonds, &c., on application of F. P. Gray, adm'r, &c.	50	18
Subpœna	73	27
Marshal's return	75	28
Answer of Napoleon B. Tumlin *et al.*	77	29
F. P. Gray *et al.*	80	30
Sureties on administrators' bond of Gray & Erwin	91	34
Demurrer to bill	94	35
Order for hearing on demurrer (omitted in printing)	96	—
Order resetting demurrer for hearing (omitted in printing)	97	—
Order overruling demurrer	98	36
Opinion and order granting injunction and appointing receiver (omitted in printing)	99	—
Injunction (omitted in printing)	102½	—
Marshal's return (omitted in printing)	103	—
Bond of receiver (omitted in printing)	104	—
Order of reference to special master	109	36
Answer of John Neal (omitted in printing)	111	—
Order making W. H. Hughuley party defendant (omitted in printing)	118	—

JUDD & DETWEILER, PRINTERS, WASHINGTON, JULY 15, 1887.

	Original.	Print.
Order abating case as to Noah King (omitted in printing)	119	—
Amendment to bill	120	37
Order on amendment to bill	124	39
Answer of F. P. and Cora M. Gray	125	39
H. C. and J. G. B. Erwin	129	41
H. C. Ramsauer	133	43
J. M. Veach *et al.*	137	44
Replication	145	47
Order to file replication	147	48
First report of E. N. Broyles, special master, (portions omitted in printing)	148	49
Exceptions to master's report by defendants W. I. Benham *et al.*	231	69
" " " complainants (portions omitted in printing)	236	71
Additional exceptions to master's report by complainant (portions omitted in printing)	252	72
Exceptions to F. P. Gray, administrator (omitted in printing)	276	—
Petition of J. M. Veach *et al.*	288	73
Order granting leave to defendants Erwin *et al.* to file answers	292	75
Joint affidavit of J. G. B. and H. C. Erwin, &c.	293	75
Affidavit of John A. Erwin	301	78
Order recommitting case to special master	305	80
Second report of special master	308	81
Report of special master on exceptions by complainants	322	89
" " " liability of sureties on first bond of Gray & Erwin	342	98
Report of special master on exceptions of Gray	350	101
" " " " Benham *et al.*	363	107
Exceptions of complainants to master's report of Oct. 4, 1884, on the liability of sureties	366	108
Exceptions of defendants Veach *et al.* to master's report	371	110
Supplemental answer and petition of Cora Gray	373	111
Index to testimony before special master (omitted in printing)	376	—
Testimony before special master (omitted in printing)	378	—
Exhibits to master's report	813	112
Exhibit A—Agreement to use original records	813	112
B—Temporary administrator's bond of June 11, 1875	814	114
B—Administrator's bond, Aug. 2, 1875, &c.	816	114
C—(Omitted in printing)	830	—
D— " "	882	—
E— " "	943	—
F— " "	971	—
G— " "	1002	—
H— " "	1017	—
I— " "	1029	—
L—Admission as to removal of Erwin & Tumlin from State, &c.	1048	120
N—Petition of John A. Erwin	1049	121
M—Application for order allowing commission on property delivered to the distributees in kind	1058	125
O—List of property which came into the administrators' hands (portions omitted in printing)	1060	126
P—Application of Erwin to resign, &c.	1070	127

	Original.	Print.
Exhibit Q—Gray's bond to Erwin for indemnity	1073	129
R—Commissioners' report distributing lands, &c.	1077	131
S—Order allowing time to make annual return	1089	137
T— " " " "	1090	137
U— " " " "	1091	138
V— " " " "	1092	138
W— " " " "	1093	139
X— " " " "	1094	139
Y—Petition of Wafford *et al.* to be released from Gray's bond	1095	139
Consent as to testimony of Cook & Dodson (omitted in printing)	1103	—
Testimony of Cook & Dodson (omitted in printing)	1104	—
Testimony of Dr. W. L. Benham	1119	143
J. J. Howard	1119	143
Robt. L. Rogers	1119	143
A. C. Trimble	1120	144
James M. Veach	1120	144
J. A. Howard	1120	144
W. T. Wafford	1121	144
J. B. Conyen	1121	144
Interrogatories to John A. Erwin	1125	146
Deposition of John A. Erwin	1130	148
Interrogatories to H. C. Erwin *et al.*	1137	150
Deposition of H. C. Erwin *et al.*	1142	169
Application of John A. Erwin for leave to resign, &c., and proceedings thereon	1149	172
Powers of attorney to sign bonds	1183	187
Interrogatories and deposition of J. A. Howard (omitted in printing)	1195	—
Petition of Cora M. Gray	1203	192
John S. Leake	1208	194
Dismissal as to Wafford	1213	196
Final decree	1214	197
Notice of appeal	1235	206
Order of reference as to amount of appeal bond	1239	208
Report of matter as to amount of appeal bond, &c.	1240	208
Bond	1243	209
Petition for appeal	1247	211
Order allowing appeal	1250	213
Clerk's certificate	1252	214
Statement of errors and parts of record to be printed	1253	214
Stipulation as to printing	1264	220

1 In the United States Circuit Court for the Northern District of Georgia.

To the judges of the United States circuit court for the northern district of Georgia.

The bill of complaint of James L. Rice and his wife, Ada S. Rice, citizens of the State of Tennessee and residing in the county of Davidson, in said State of Tennessee, bring this their bill of complaint against Frank P. Gray and against his wife, Cora M. Gray, and also against the said Frank P. Gray, as administrator of the estate of Lewis Tumlin, deceased, and against the said Frank P. Gray, as guardian of the said Cora M. Gray; Napoleon B. Tumlin, George H. Tumlin, Lula T. Lyon, John S. Leake, John W. Gray, William T. Wofford, Absalum P. Wofford, James M. Veach, Edwin M. Price, Noah King, Thomas W. Leake, A. C. Trimble, Joel H. Dyer, William W. Rich, Nelson Gilreath, John J. Howard, Robert L. Rogers, William I. Benham, Francis M. Ford, Miles G. Dobbins, and Thomas Warren Akin, all citizens of the State of Georgia and residing in the county of Bartow, in said northern district of
2 Georgia; Mary L. Spencer, also a citizen of said State of Georgia and residing in the county of Walton, in said northern district of Georgia; A. W. Mitchell and John Neal, citizens of the said State of Georgia and residing in the county of Fulton, in said northern district of Georgia, and Henry C. Ramsour, administrator on the estate of Lewis R. Ramsour; John G. B. Erwin and Henry C. Erwin, all citizens of said State of Georgia and residing in the county of Gordon, in said northern district of Georgia.

And thereupon your orator and oratrix complain and say that on the second day of June, 1875, one Lewis Tumlin, of the county of Bartow, Georgia, died intestate, leaving at his heirs-at-law his widow, Mary L. Tumlin, now the said Mary L. Spencer, she having since the death of said Tumlin intermarried with one H. L. Spencer, of the county of Walton, in said State; his sons, Napoleon B. Tumlin and George H. Tumlin; his daughter, your oratrix, the said Ada S. Rice, formerly Ada S. Tumlin, said Lula T. Lyon, formerly Lula Tumlin, said Cora M. Gray, formerly Cora M. Tumlin, and one Lewis T. Erwin, the son of a deceased daughter, who, complainants are informed and believe, has since sold and conveyed his interest
3 in said estate to said John S. Leake and now has no interest in the subject-matter of this suit, each of whom upon his death were entitled to one-seventh part of his estate, his widow having elected to take a child's part in lieu of dower; that his estate at the time of his death consisted of several valuable tracts of land in the county of Bartow and other counties in Georgia, a farm in the State of Alabama, city property in Cartersville, in said county of Bartow, wild lands in Bartow and other counties of said State, and personal property of almost every kind and description, including cash, bank stocks, notes, accounts, mortgages, and other assets, rights, and credits, said estate being of the aggregate value of about three hundred thousand dollars.

And immediately after the death of the said Lewis Tumlin, and without the knowledge and consent of complainants, said Frank P. Gray, who had intermarried with said Cora M. Gray, and said Napoleon B. Tumlin obtained temporary letters of administration on said estate, and on the 11th day of June, 1875, gave bond as temporary administrator in the sum of two hundred thou-
4 sand dollars, with the said Abda Johnson, William T. Wofford, John W. Gray, James M. Veach, and Edwin M. Price as sureties, certified copy of which bond is hereto attached, marked "Exhibit A," to which, as well as to all the other exhibits of this bill hereinafter named, complainants pray they may have the usual leave of reference.

That said temporary administration continued until the second day of August, 1875, during which time said Frank P. Gray had the actual control and management of said estate, the connection of said N. B. Tumlin therewith being, as complainants are informed and believe, only nominal.

That on said second day of August, 1875, said Frank P. Gray and one John A. Erwin obtained permanent letters of administration on said estate and gave bond as such in the sum of six hundred thousand dollars, with the said Abda Johnson, William T. Wofford, John W. Gray, James M. Veach, Edwin M. Price, Noah King, A. C. Trimble, Joel H. Dyer, William W. Rich, James C. Wofford, Nelson Gilreath, John J. Howard, Robert L. Rodgers, William I. Benham, John S. Leake, A. W. Mitchell, John G. B. Erwin,
5 Henry C. Erwin, and the said Lewis R. Ramsour, the intestate of the said Henry C. Ramsour, and one Thomas Stakley and one Thomas Tumlin, as sureties on said bond, a certified copy whereof is hereto attached, marked "Exhibit B;" that the said John A. Erwin has since that time removed from the State of Georgia to the State of Tennessee and the said Thomas Tumlin has since that time removed from the State of Georgia to the State of Alabama, and both now reside outside of the northern district of Georgia; that the said Thomas Stokely has died intestate and no letters of administration have been granted on his estate until within less than twelve months before the filing of this bill; that said Abda Johnson died while this bill was being prepared, to wit, on the 10th day of July, 1881, and, whether he died testate or otherwise, his estate is now unrepresented, and for these reasons said Erwin, Tumlin, and Stokely and Johnson are not made parties; that said Lewis R. Ramsour also died intestate and said Henry C. Ramsour has qualified as administrator on his estate and, as such, is made a party; that the joint administration of said Frank P. Gray and John A. Erwin
6 continued from the 2nd day of August, 1875, until the 2nd day of May, 1876, when the said John A. Erwin resigned and his resignation was accepted by the court of ordinary of the county of Bartow.

Complainants show that neither said Gray nor said Erwin were entitled by law to letters of administration on said estate, nor were they the choice of the majority of the heirs of said estate, but their appointment was due to the fact that said Mary L. Spencer was en-

titled by law to said administration and, if she desired so to do, to associate some other person with her, and she had selected the said Gray, and the heirs believed it would be better for said John A. Erwin, who had no interest in said estate, to be associated with said Gray, who was then young and inexperianced, especially as the said Erwin had the reputation of being an excellent business man, rather than have said administration on this large and valuable estate cast upon the widow, who was wholly unacquainted with business, and said Gray, who had just attained his majority.

Complainants and the other heirs were induced to consent
7 to this arrangement by the special promise of said Erwin to give his personal attention to the business of this estate until it was wound up, but their expectations were disappointed by the resignation of said Erwin in less than twelve months after his qualification and the conduct of said Gray in said administration, as hereinafter set forth. In fact complainants are informed, believe, and charge that said Erwin became so much dissatisfied with the conduct of his co-administrator and so much alarmed at the liability with which he was threatened that he resigned his trust to avoid the consequences of said Gray's waste and mismanagement, and even consented to surrender to said Gray his commissions and compensation for the sum of three hundred dollars, provided Gray would i-demnify him and his securities against loss, which the said Gray accordingly did, and thereupon said Gray became sole administrator against the consent and at the protest of all the heirs, except Cora M. Gray and Mary L. Spencer, and gave bond as sole administrator in the sum of one hundred and forty thousand dollars, with

the said Abda Johnson, William T. Wofford, Edwin M. Price,
8 Noah King, William W. Rich, John W. Gray, Nelson Gilreath, James C. Wofford, John S. Leake, and Thomas W. Leake as sureties, certified copy of which bond is hereto attached, marked "Exhibit C."

That on the eighteenth day of October, 1877, said William T. Wofford, James C. Wofford, and William W. Rich applied to be relieved from their suretyship on the bond aforesaid on account of their want of confidence in said Gray, and were so relieved, and said Gray gave a new bond as such administrator for the same sum, with the said Abda Johnson, Nelson Gilreath, Noah King, John S. Leake, Thomas W. Leake, Thomas Tumlin, John W. Gray, Absalum P. Wofford, and Francis M. Ford as sureties, certified copies of which bond is hereto attached, marked "Exhibit D."

That on the sixth day of May, 1878, said Noah King applied to be relieved on his bond last aforesaid, and was so relieved, and the said Frank P. Gray gave another bond as administrator in the sum of one hundred and forty thousand dollars, with the said Abda Johnson, Nelson Gilreath, John W. Gray, Absalom P. Wofford, John S. Leake, Thomas W. Leake, and Francis M. Ford as sureties, certified copy of which bond is hereto attached, marked "Exhibit E."

9 That since that time said Gray has continued to act as ad-

ministrator under the bond last aforesaid, and is still in possession of the effects of said estate not heretofore disposed of.

Complainants further show that previous to the death of said Lewis Tumlin he made advancements to some of his children, amounting in all to about thirty-seven thousand dollars, and on the 2d day of October, 1875, a distribution of property in kind was made, and each of the heirs received twenty-four thousand dollars, including the advancements. Complainants further show that since that time said administration has made no distribution on account of said estate, and complainants have only received about the sum of one hundred and eighty dollars, while they are informed and believe that said Mary L. Spencer has received about three thousand dollars; said George H. Tumlin about eleven hundred dollars; said Lula T. Lyon about fifteen hundred dollars, and said Cora M. Gray has received about eighteen hundred dollars, besides the various sums settled on her by her husband, as hereinafter set fourth.

10 Complainants further show that at the time of the death of the said Lewis Tumlin his estate was abundantly solvent, and his liabilities did not exceed the sum of forty thousand dollars, all of which ought to have been long since paid off and discharged and the estate fully wound up, and the balance remaining upon account of said administration distributed to the heirs of said Tumlin, which said Gray undertook and promised to do by his several bonds aforesaid; but, on the contrary, complainants aver that he has hitherto neglected and refused to account to the heirs of said estate, and the complainants especially, or to pay over to them their distributive share therein, which they aver to be of the value of at least five thousand dollars, besides the real estate hereinafter named.

Complainants further show that during said administration said Frank P. Gray has engaged in numerous illegal acts connected therewith, consisting of negligence, waste, mismanagement, and fraud; that he neglected to make out a full and correct inventory in the beginning, and has repeatedly failed since that time to make out full and complete returns of the affairs of said estate as re-

11 quired by law, in many instances failing to account for large sums of money received in the course of said administration and in others taking credit for sums never paid out or paid out upon improper or illegal demands and for unnecessary expenses. As instances of this negligence, waste, and fraud, complainants aver and charge that he has committed the following negligent, illegal, and fraudulent acts, to wit: That he neglected to include in the inventory of said estate the wild lands thereof, amounting to two thousand acres or more, or have the same appraised, as required by law.

That he failed to describe in said inventory the evidences of debt belonging to said estate, except by their date and amount, while in many instances they consisted of notes and mortgages given by solvent persons for large sums and containing valid contracts for rates of interest ranging from ten to twenty per cent. per annum, by reason of which negligence the heirs of said estate are unable to ascertain from said inventory what interest had accumulated on said notes and mortgages.

12 That on his first annual return he credits himself with two and one-half per cent. on the sum of thirty-four thousand six hundred and seventy-eight dollars as cash received, including in said eleven thousand two hundred and fifty-five & $\frac{58}{100}$ dollars cash on hand at the death of said Tumlin, upon which complainants are advised and believe he was entitled to no commissions; that in his first annual return he credits himself with three hundred and eighteen dollars commissions at ten per cent. on growing crops, which complainants are advised and believe is illegal, and so charge.

That in said first return he credits himself with three thousand four hundred and thirty-three $\frac{58}{100}$ dollars for commissions at three per cent. on the property distributed in kind among the heirs, while, in fact, the property so distributed consisted mainly of real estate, and surveyors and commissioners were paid from the estate to make the distribution, which was done in a few days, and with but little trouble to the administrator. Complainants are advised and believe that this compensation is illegal and excessive, and so charge. That

13 in all of his returns he has credited himself with ten per cent. commissions on interest collected, including in the amounts upon which he charges these commissions the interest which accrued in the lifetime of Lewis Tumlin, upon which complainants are advised and believe he was only entitled to commissions at the rate of two and one-half per cent; that upon the returns made by him and the said Erwin in the year 1876 he took credit for the sum of five thousand four hundred and sixty-eight $\frac{29}{100}$ dollars, most of which was illegal, as before set fourth, and on his annual return for the year 1877 he again took credit for the same sum and the same commissions and compensation.

That in his annual return for the year 1876 he took credit for the sum of four hundred and sixty-seven $\frac{38}{100}$ dollars for commissions at the rate of two and one-half per cent. on cash received, including in the sums upon which he charged these commissions a balance of six thousand six hundred and forty-three & $\frac{64}{100}$ dollars brought forward from a previous year upon which commissions had already been charged.

14 That in his annual return for the year 1877 he took credit for the sum of four hundred and forty-one $\frac{39}{100}$ dollars for commissions at two and one-half per cent. on cash received, including in the sum upon which he charged this commission a balance of seven thousand seven hundred and ninety-nine and $\frac{97}{100}$ dollars brought forward from previous year upon which commissions had already been charged, and that in both of these returns for the years 1876 and 1877 he includes all the items of interest collected during those years, and charges commissions both at two and one-half per cent. and ten per cent.

That at the time he took charge of the estate he received two notes on A. R. Hudgins—one for one thousand dollars, bearing interest at twelve per cent. per annum, and one for fifteen hundred dollars, bearing interest at eighteen per cent.—upon which said Hudgins had paid to said Tumlin in his lifetime one thousand dollars, upon which notes said Hudgins has paid him over thirty-one hundred

dollars, and although most of this amount was paid him prior to his last annual return he has accounted in his returns for only three hundred and seventy-one and $\frac{23}{100}$ dollars; that he has collected from Isham Alley on a debt due said estate over thirty-eight hundred dollars, for none of which he had accounted in his returns, when in fact most of it was paid to him prior to his last return.

That he has collected of one Randolph Borders on a debt due said estate over nineteen hundred and fifty dollars, for which he has never accounted in his returns.

That he has collected of S. A. Pullam one thousand dollars on a debt due said estate, for which he has never accounted in his returns.

That in his first annual return for 1876 he accounts for the sum of two hundred and twenty-one *dollars* and $\frac{17}{100}$ dollars as rents of a farm in Floyd county, Georgia, for the year 1874; that since then he has accounted for only two years' rent, leaving the rents for the balance of the time unaccounted for, and complainants aver and charge he has collected said rents for all the time, except the years 1880 and 1881.

That when said Tumlin died he owned a farm in Bartow county, Georgia, known as the Creswell place, which had been rented for that year for twenty-five bales of cotton, worth at least twelve hundred dollars, which he collected, or ought to have done, and has never accounted for.

That he has collected or should have collected the rents of a farm in Alabama for six years from 1875 to 1880, inclusive, and that he has accounted for only three years of said rents, amounting to nine hundred and seventy-five dollars, and complainants charge that he should have accounted for some like sum for the other three years.

That in 1876 he sold the mills of said Lewis Tumlin at administrator's sale to said Francis M. Ford for thirteen hundred dollars, and that he has collected all of said sum, with interest thereon, and has never accounted for any of it, except the sum of one hundred and sixty-two dollars & $\frac{50}{100}$.

Complainants further show that at the time of the death of said Tumlin he and one B. G. Pool and one D. W. K. Peacock were partners in the manufacture of iron under the firm name of B. G. Pool & Co.; that said Pool and Peacock were both at that time largely indebted to the partnership, and said Peacock was insolvent, and since that time they have both been adjudged bankrupts; but complainants are informed and believe that said Pool was able to have paid all of his legal liabilities, as he had an interest in a valuable farm in the State of Alabama, worth at least, as complainants are informed and believe, eight or ten thousand dollars, and also a valuable interest in mining property in said county of Bartow, which he has since sold for ten thousand dollars.

That said Gray, soon after he obtained administration — said Tumlin's estate, filed his bill in the superior court of Bartow county, as administrator, against said Pool and Peacock, alleging, among other things, their indebtedness to the partnership, insolvency,

waste, and mismanagement as surviving partners and danger of loss to the estate of Tumlin, and praying for an injunction, and on account of the affairs of said partnership, pending a hearing upon this bill, he obtained the consent of Pool and Peacock to his appointment as receiver of the assets of said partnership, and upon their consent was so appointed, without giving bond as such receiver for the faithful discharge of his duties, and as such receiver
18 under said consent order took possession of the effects of said partnership, consisting of notes amounting to about two hundred dollars, mules, and wagons, with about five hundred dollars, and, according to the inventory returned by him as such receiver, from four hundred and thirty to four hundred and fifty tons of pig-iron, of the value of about six thousand dollars; all of which he has disposed of and converted into money, and, as complainants are informed and believe, he has realized at least that amount; that a final decree has been had in favor of said Gray, as administrator, in said case against said Pool for five thousand dollars, and against said Peacock for nineteen hundred dollars. This decree extinguished all claim of said Pool and Peacock as partners in the assets of said partnership. Complainants are unable to exhibit certified copies of these proceedings to this bill. They have applied to the clerk of said court for the same, and were informed that they were not on file and had not been enrol-ed; that they were withdrawn from the files before they were enrolled by some one un-
19 known. Complainants further show that said Frank P. Gray has made no returns of his accounts as receiver, except an inventory of the property and a return of the sales of the mules of said partnership, amounting to four hundred and eighteen dollars, — copy of which is hereto attached, marked "Exhibit F."

Complainants are informed and believe that he has collected on said decree against said Pool two thousand dollars or near that sum, which was paid him by said Pool on an agreement to compromise said decree for that amount. Complainants charge that said Pool, at the time said decree was obtained, was worth said sum of five thousand dollars, and the debt was therefore solvent, and that said Gray knew his condition, and that this settlement was waste in said administration, and that of the sum so collected he has accounted for only four hundred and forty-seven dollars. Complainants further show that, to the best of their knowledge, information, and belief, the liabilities of said B. G. Pool and Co. amounted to only about six thousand dollars, and that the effects of said partnership
20 going into his hands as receiver were amply sufficient to pay off and discharge said debts and should have long since been paid by him as receiver, but, instead of doing so, complainants show that on the 15th of February, 1878, he paid to the Planters' and Miners' Bank the sum of nine hundred and eighty-six $\frac{39}{100}$ dollars on a debt of said firm and took credit upon his returns as administrator for that year for that amount, and permitted one Silas Stephens and Aaron Knight and R. W. Satterfield and others to recover judgements against him as administrator for the principal sum of about two thousand dollars, most of them bearing interest at one

per cent. per month—these judgements were obtained in the courts of Bartow county, Georgia—and also permitted Pique, Manier, and Hall to obtain judgement in the United States circuit court for the northern district of Georgia for about fourteen hundred dollars, principal and interest, when he had means in his hands as receiver to pay off and discharge the same; and complainants aver and charge that he not only neglected to do so, but they are informed and believe that he procured said Miles
21 G. Dobbins to take control of all of said executions and hold them up for his benefit by agre-ing to pay to said Dobbins excessive and usur-ous rates of interest, and has in fact paid him, besides other sums paid out and promised, over two hundred dollars interest on these debts, for which he has taken credit on his returns as administrator; and complainants further show that, notwithstanding the fact that he had the funds aforesaid in his hands as receiver, as well as the funds aforesaid in his hands as such administrator, he has failed and neglected to protect said estate against said executions.

Complainants in this connection respectfully show that said Lula T. Lyon heretofore filed her bill against said Gray as administrator in the superior court of Bartow county, Georgia, seeking an account of her distributive share in said estate, and praying an injunction to restrain said Gray from selling the real estate of said Tumlin, which he was on or about the first day of January last
22 seeking to do, which injunction so prayed had been granted by the judge of said court and had duly issued; and complainants aver and charge that said Gray permitted said Dobbins to have said execution in favor of Pique, Manier, and Hall to be levied upon all or about all of the real estate of said deceased, consisting of part of the city property of said estate in the city of Cartersville, Georgia, of the value of about one thousand dollars, and twenty-seven lots of land, containing about one thousand and eighty acres, in the seventeenth district of Bartow county, of the value of at least two dollars per acre, and also on a farm in Floyd county, Georgia, consisting — two hundred and fifty acres, of the value of four thousand dollars, and the farm in Floyd county was advertised for sale at marshal's sale in the city of Atlanta on the first Tuesday in July, 1881; and the complainant shows that said Dobbins had filed with the marshal the other executions hereinbefore described, issued from the State courts in favor of Knight and Stephens and Satterfield, amounting to some two thousand dollars, with instructions to collect them at said sale, they being older liens
23 than that of Pieque, Manier, and Hall, and at the same time permitted one John Neal, by his attorney, who is also the attorney of the said Gray, to notify the said marshal to hold up any apply any moneys raised by the sale of said property under said *fi. fa. to be applied* to two executions, one in favor of John Neal against said Thomas Tumlin and Lewis Tumlin as security, and another in favor of N. L. Angier, trustee, against said Gray as administrator, both of which, in the aggregate, amounted to between eight and nine thousand dollars, the facts in reference to both of which are

hereinafter more fully stated, and neither of which, as complainants are advised and believe, is now a just demand against said estate.

Complainants charge that said Miles G. Dobbins was well informed of the condition of said Gray's account as receiver of the effects of B. G. Pool & Co. and his duty as such receiver, and was also well informed of his conduct and his obligations as administrator of said estate, not only at the time he made said arrangements with said Gray for said rates of interest but all the time since, and com-
24 plainants charge that said levies were advertised and permitted to be advertised by said Gray after the injunction was granted, as hereinbefore described, for the purpose of bringing all of said lands to sale and applying the proceeds to the payments of the debts aforesaid and the interest aforesaid which he had agreed to pay said Dobbins and the said debts to said Neal hereinafter described, which purpose, complainants charge, was know- to said Dobbins. As evidence of this complainants state that James L. Rice had been in the city of Cartersville for some fifteen days before said first Tuesday in July, endeavoring to procure a settlement of the distributive share of his wife, Ada S. Rice, in said estate, and also at the same time, if possible, to bring about a settlement between said Gray and the other distributees, and especially Napoleon B. and George H. Tumlin, who- he was authorized to represent in a settlement; that during that time he had daily interviews with said Gray, and said Gray well — never informed him that said sale was pending and would take place on said first Tuesday until the Saturday night before, about dark, and the intervening
25 Sunday and Monday were both holidays, so that complainant was practically deprived of all opportunity in the ordinary way of business of taking any steps to prevent said sale. It was certainly too late for legal proceedings; he did, however, succeed in raising money sufficient to attend said sale and prevent it by paying off said *fi. fa.* and protecting said property from sale. Complainants show that when they first learned of this sale that J. L. Rice went to said Dobbins to see what arrangement could be made to prevent said sale, and proposed to said Dobbins to pay him the amount of said *fi. fa.* and take a transfer of the same, which Dobbins refused to do unless he was paid his other executions or all the heirs of said estate would agree to waive all objection to said executions and consent to said real estate to be sold for their satisfaction. Complainant, J. L. Rice, then went to Gray and tried to get him to prevent said sale, which Gray proposed to do but only on condition that the heirs of said estate would agree in uniting that said executions
26 were valid and promise to pay them in ninety days or consent to a sale of the lands to pay them. This complainant refused to do, and upon Dobbins' refusal to accept the money and transfer said *fi. fa.* he paid the full amount thereof to the United States marshal, being the sum of fourteen hundred and thirty-five and $\frac{69}{100}$ dollars. Complainants aver and charge that said Miles G. Dobbins, in this transaction, attempted to use said United States court execution to compel the payment of said State court *fi. fas.*, apparently with the consent and approval of said Gray, and complainants being

thus forced to pay off said *fi. fa.* to prevent the sacrifice of said lands they are advised and believe that they are entitled to be repaid the money so paid out in the same order of distribution that said *fi. fa.* was originally entitled to be paid.

Complainants further show that at the time of the death of the said Lewis Tumlin said Thomas Tumlin was indebted to said John Neal on a note about twenty-one hundred dollars, bearing interest at 18 per cent. per annum, upon which note said Lewis
27 Tumlin was security; that said Thomas Tumlin was at that time solvent, but soon began to be in failing circumstances, and the heirs of said estate were anxious for the estate to be relieved from said liability, and, finding that one of said heirs, Napoleon B. Tumlin, was indebted to said Thomas Tumlin about twenty-four hundred dollars, it was arranged among the parties that said Gray should loan said Napoleon B. Tumlin that sum out of the funds of the estate of Lewis Tumlin, and said sum of money was to be taken by Gray, and by mutual arrangement between Gray, Napoleon B., and Thomas Tumlin, was to be paid by said Gray to said Neal and thus extinguish the debt of Thomas Tumlin to Neal and Napoleon B. to Thomas Tumlin. Said Napoleon B. at the same time gave his note, and mortgage to secure the notes, to said Gray as administrator, which note and mortgage said Gray has since collected in money from said Napoleon B. Tumlin, but not withstanding this arrangement he has not paid off said debt, but, on the contrary, permitted said Neal to recover judgement against said Thomas Tumlin and himself as administrator, which now stands open against said
28 estate for about fifteen hundred dollars, while said Thomas Tumlin has in the meantime removed from the State, and has left no property in the State that can be subjected to said debt. During all this time, until within the last year or so, said debt could have been collected out of said Thomas Tumlin by due diligence, but instead of compelling its payment said Neal and Gray agreed, in consideration of a high rate of interest said note was bearing, to extend from time to time the payment thereof. Complainants are advised and believe that said Gray had no authority to make said contracts as administrator to extend the liability of said estate as securety, but whether he had or not he is nevertheless, complainants charge, liable to account to the heirs for any loss they may sustain on this account.

Complainants further show that on the 15th day of January, 1878, one N. L. Angier, as trustee, recovered against said Gray, as administrator of said Tumlin, in the superior court of Bartow county, a judgement, which on the 21st day of June, 1879, amounted to
29 fifteen thousand six hundred and seven and $\frac{91}{100}$ dollars, and on that day he took the receipt of Thomas Warren Akin, plaintiffs' attorney, for that sum in full of principal, interest, and cost on this judgement, and in his annual return for the year 1879 he took credit for that sum and returned said receipt for a voucher. Complainants show, however, that he in fact, instead of having the execution issued from said judgement entered satisfied and so returned, *he* caused the same to be delivered to said John Neal as an

open *fi. fa.* against said estate, and either himself transferred it to him or had it done, and at the same time, or soon after, transfer-ed to him notes belonging to said estate, well secured by mortgage, on R. W. Young and P. M. B. Young for over six thousand dollars. This was done to secure a loan by said Neal to Gray for largely over seven thousand one hundred dollars upon which Gray was to pay usurious interest, as complainants are informed and believe, at the rate of one per cent. per month. Said execution and said notes and the Young's mortgage to secure them are now in the possession and custody of said Thomas Warren Akin, who claims to hold
30 them, as attorney, for collection, to be applied when collected to the balance claimed on judgement by said Neal. Complainants are advised and believe that said execution ought to be entered satisfied and said notes and mortgage surrendered. All the executions controlled by both Neal and Dobbins have been levied on the property of said estate.

Complainants further show that there went into his hands, as administrator, notes on J. W. Clayton, who was insolvent, for over two thousand dollars. The consideration of these notes was a tract of land in Bartow county, the title to which was in said Tumlin, and was retained by him to secure the payment of the purchase-money. Said Gray sued said notes to judgement and brought said land to sale for said debt, and caused it to be bid off for his wife, Cora M. Gray, for five hundred and fifteen dollars, and she has since conveyed it to John S. Leake, who had notice of all the facts. Complainants charge that said land was worth the amount of said debt. In fact, said Mary L. Spencer under an arrangement with said Clayton and one
31 Hunneycutt, offered to pay to said Gray said sum and take a deed to said land, which Gray refused to do, but actively engaged in bringing the same to sale and preventing competition at the sale, and himself procured one N. E. Eaves to bid it off for said Cora M. Gray, and he has not even accounted in his returns for said five hundred and fifteen dollars.

Complainants are advised and believe that they are entitled to have said sale set aside as fraudulent and void, or to compel said Gray to account for the full amount of said notes at their election.

Complainants further show that there went into his hands as administrator the following notes on one John W. Wofford, one due November 23d, 1872, for three hundred dollars; one due Feb'y 23, 1872, for three hundred and fifty-nine and $\frac{58}{100}$ dollars; one due Sept. 28, 1874, for ninety dollars; one due May 1st, 1875, for fifty-seven and $\frac{80}{100}$ dollars, and two other notes, dated Jan'y 14, 1874, each for one thousand dollars, bearing interest at ten per cent.
32 per annum, well secured by mortgage on a house and lot in the city of Cartersville, known as the Wofford house, on Market street. Said Wofford was an attorney-at-law and resided in Cartersville until January, 1877, when he became hopelessly insolvent and removed to Missouri. At the time he left he claimed to have an account against said Tumlin and Gray as administrator for professional services for twenty-two hundred and three and $\frac{50}{100}$ dollars, upon which had been paid eight hundred and seventy-four and $\frac{30}{100}$

dollars. This account was afterwards settled by surrendering all of the said notes except the two notes for one thousand dollars each, and said Gray took the receipt of said N. P. Wofford, who claimed to be the transferee of said account in favor of John W. Wofford for five hundred dollars, and said Gray has taken credit upon his returns for that sum. This payment, if in fact made, complainants aver was waste, because at the time of said pretended payment there was due on said two notes not surrendered, including interest, over three thousand dollars, and the mortgage-property was not sufficient to secure their payment. In fact, said mortgage had been fore-
33 closed and the property b-ought to sale and sold for twenty-five hundred dollars and the balance on said notes and mortgage will prove a total loss. And complainants further show that he placed the notes and mortgage aforesaid for collection in the hands of A. P. Wofford, an attorney-at-law, a brother of said John W. Wofford, one of said Gray's sureties, and who claimed to be transferee of all the said J. W. Wofford's property, and had proceedings instituted to foreclose the same. Pending the proceedings to foreclose said mortgage one Joel T. Conyers procured a *fi. fa.* to be levied on said mortgaged property and had it brought to sheriff's sale under his *fi. fa.*, the lien of which was inferior to the mortgage. Said A. P. Wofford was the attorney of said estate and as such attended said sale to represent its interest, and as such gave public notice at the sale of the existance of the mortgage, after which he procured it to be bid off for him for the sum of five dollars. Complainants charge that the effect of this purchase was to vest the title in him for the benefit of said estate, and that he took the same in trust for the heirs
34 and creditors. Complainants are unable to state what conveyance was made by the sheriff, but they do show that said Gray since said sale has annually paid the insurance and tax on said property and taken credit for said amounts in his accounts as administrator. Said mortgaged property is charged to be of the yearly value for rent of one hundred and fifty dollars, and for the last four years has been occupied by tenants of said Gray or Wofford or both of them. Complainants claim that they are entitled to an account for the rents during that time.

Complainants further show that said Gray, after his appointment as administrator, as they are informed and believe, employed one John W. Wofford as an attorney for said estate, and also Abda Johnson, and after the removal of said John W. Wofford the firm of Stansell and Wofford and A. P. Wofford, as successor of J. W. Wofford; and complainants are informed and believe and so charge that there was an agreement with some, if not all, of said attorneys to divide with him their fees and commissions, giving to said Gray one-half
35 of the same, and he has since taken credit on his returns as paid to John Wofford six hundred dollars, to Stansell and Wofford and A. P. Wofford over two thousand dollars, and to Abda Johnson about eight hundred dollars. Complainants aver that he is only entitled to credit on his accounts as administrator to the amount actually paid to said attorneys, and that only upon strict proof of the necessity of their employment and the value of their services.

Complainants further show that on the 22d day of October, 1875, he paid to Abda Johnson nine hundred and sixty-nine dollars upon a pretended claim in favor of W. W. Rich, former sheriff of Bartow county, for balance of purchase-money of a tract of land bought by said Tumlin at sheriff's sale in the year 1868, and took credit upon his returns for that sum. Complainants charge that this debt was barred by the statute of limitations in the lifetime of said Lewis Tumlin, even if it had not been paid.

36 Complainants further show that on his return for the year 1879 he takes credit for the sum of six hundred and twenty dollars, "as overcharge in the return of 1876 as collection on Stokely note," when in fact said Stokely had paid him said sum on a debt due said estate; and complainants are informed and believe that said Stakley has never made any claim for the repayment of the same, and has never, in fact, been repaid; said sum was paid to said Gray and put to his credit, as adm'r, in Planters' and Miners' Bank, and said entry discharging him from said collection is incorrect.

Complainants further charge that in the year 1875 said Gray sold to Gilreath and Son, merchants in Cartersville, the crop of cotton raised that year on the lands *on* said Lewis Tumlin for about fifteen hundred dollars, and that, although said cotton was a ready-cash commodity, yet said Gray has never collected or never accounted for seven hundred and fifty dollars of said sum, besides interest on it, for which complainants are advised and believe and charge he is liable.

37 Complainants are informed and believe, and so charge, that Lewis Tumlin, at the time of his death, owned a one-third interest in a newspaper known as the "Express," published in Cartersville, Ga., together with the printing-press and its attachments, the good will, etc., of said business, and subsequently said Gray sold to one Willingham said press and took his note therefor for the sum of two thousand dollars, and afterwards said — enforced an attachment against said Willingham and had said press, etc., sold at s-eriff's sale, when he bid in the same for himself for the sum of fourteen hundred and five dollars, which sum said Gray has never charged himself with as administrator, nor has he accounted in his returns for any part of said sum or for any rents from said press, as he in good faith should have done.

Complainant's charge that at the time of the death of said Tumlin he owned two-ninths interest in what was known as the Euharlee Mills, a valuable flour mill in said county, and that said Gray

38 has received the income from said mills ever since he has been appointed as administrator, amounting in the aggregate to about five hundred dollars, and has never accounted for any part thereof, and that said mills were, over one year ago, sold under a proceeding for partition, in the superior court of Bartow county, for the sum of about five thousand three hundred dollars and that said Gray has received or should have collected about twelve hundred dollars thereof, being the interest of said Tumlin therein, and has never accounted for the same.

Complainants have set out specifically these instances of negligence, waste, and mismanagement and fraud for the purpose of showing the general course of said Frank P. Gray, as administrator, in the execution of his trust, and expressly charges that he has been guilty of numerous other acts of like character, impossible to be set out in detail. In fact he has collected in cash, from the assetts of said estate, over eighty-seven thousand dollars, and has paid out to the just and legal liabilities of said Lewis Tumlin not exceeding twenty-five thousand dollars.

39 A large part of the balance of this sum he has attempted to account for by pretended disburs-ments for expenses of administration, which complainants charge are in most instances illegal and unjust, and much of the balance thereof is unaccounted for, so that complainants say that he is now indebted to said estate by reason of the facts aforesaid at least thirty-five thousand dollars, for one-seventh of which he should account to complainants.

Complainants further show that at the time of the death of said Lewis Tumlin said Frank P. Gray had no property of his own whatever; that his father, the said John W. Gray, one of his sureties, was worth but little, and that said Cora M. Gray, his wife, had nothing except her interest in her father's estate; that there has been no regular distribution from said estate except the sum of twenty-four thousand dollars as hereinbefore stated; but notwithstanding the fact that only this sum has been distributed and there existed no other known source from which the said Cora M. could derive monies, she and the said Frank P. Gray in the month

40 of April, 1876, invested in a mortgage on the Oathcaloga Mills in Bartow county, the sum of thirteen thousand five hundred dollars in the name of the said Cora M., and again, in the year 1879, invested in a second mortgage on said cotton mill in the name of the said Cora M. the further sum of twenty-one thousand and three hundred dollars.

And, as complainants are informed and believe and charge, that during the year 1877, he invested in a plantation in the State of Mississippi and stock and farming equipments for the same, also in the name of the said Cora M., the further sum of twenty-six thousand dollars.

Complainants are unable to state in many instances the date at which the waste of said estate was committed by said Gray, but they are informed and believe that most of it occurred after the resignation of said Erwin and after his present bond was given, to wit, the one bearing date the sixth of May, 1878, upon which said A. P. Wofford, John S. Leake, Thomas W. Leake, F. M. Ford, John W. Gray, Nelson Gilreath, and Abda Johnson *as* sureties.

Complainants charge expressly that said F. P Gray, with-

41 out reference to his liability to this estate, is insolvent; that said A. P. Wofford, John W. Gray, and Nelson Gilreath are insolvent; that while said Abda Johnson left considerable property, with, perhaps, eighteen thousand dollars, *that* said Johnson was largely indebted and much embarrassed in his affairs, and was also security upon numerous other bonds of other trustees and in legal

proceedings upon which the ultimate liability is uncertain and unascertained. These bonds amount to twice the value of his estate, while said John S. and Thomas W. Leake and said Francis M. Ford are not worth exceeding twenty thousand three hundred dollars. In fact, they return their property for taxes at this sum, and if they have any other property complainants do not know it, nor do they know how much they are in debt, so that complainants charge that said bond is wholly insufficient for the protection of said estate.

Complainants further show that the bank stock which is still unsold and the uncollected debts due said estate amount nominally to a very large sum, perhaps fifty or sixty thousand dollars, the
42 actual value of which cannot be *be* stated precisely, but, to the best of complainants' knowledge, information, and belief, are worth at least fifteen thousand dollars; and there also remains unsold and undistributed the two thousand acres of wild lands aforesaid, worth at least two dollars per acre, and other real estate of the appraised value of about twenty thousand dollars.

Complainants further show that there is now pending in the superior court of Bartow county a number of suits in favor of said estate for the recovery of money and property, and that there is also a number of suits against said estate which have been pending for a number of years, all of which could have been long since tried and disposed of finally so that said estate could have been wound up if said Gray had sought to do — with proper dil*l*igence. In some of these cases it may be that said estate is liable, but most of them, complainants are informed and believe, are unfounded. Be this as it may, said estate is abundantly solvent, and said Gray has ample means in his hands to pay off any recovery that could be
43 had; but complainants charge that he has purposely delayed bringing them to trial in order to protract said administration and postpone the final settlement of said estate. Complainants show that said Gray has for several years past been absent from Georgia much of his time in the State of Mississippi, and lately has declaired his purpose to remove to that State, and a short time since he and his wife, Cora M. Gray, sold out all the real estate either of them owned in Georgia and converted the proceeds into money, and also sent away from said State a portion of their personal property, and on the 18th day of June, 1881, said Gray filed in the office of the ordinary of said county his resignation as administrator, and gave as his reason for so doing his purpose to remove out of said State. In this resignation he suggested as his successor in office said James C. Wofford, who is one of his sureties, well knowing that the interest of said J. C. Wofford was adverse to said estate, and that he was on that account objectionable to all the heirs of said
44 estate, except his wife, Cora M. Gray, and perhaps said John S. Leake, who has bought the interest of said Lewis T. Erwin in said estate. Certified copy of said application hereto attached, marked "Exhibit —."

The effect of this resignation is to necessarily postpone still further the time of final settlement in a court of law. The heirs will

be forced to suggest some other person as his successor, and whoever might be appointed by the ordinary appeals from his decision will produce long and vexatious delay, during which time a temporary administrator with limited powers would be the only representation on said estate.

And complainants believe and fear and so charge that unless they can have the immediate aid of a court of equity by such suitable injunction and restraining order and the early appointment of a receiver the interests of said estate will suffer great and immediate loss and complainants and the other heirs-at-law of Lewis Tumlin will be injured beyond remedy.

In fact, complainants charge that said Gray is extravagent
45 and wasteful in the expenses of himself and family, and for the last six years has lived at a cost of not less than three thousand dollars per annum, an expense not justified by any legitimate income he has had, and they charge that he has managed this estate all the time with a view to his own personal benefit and not that of the heirs, and has used the assetts of said estate to support his extravagance, and during that time he has had numerous transactions with said Miles G. Dobbins and said John Neal, who are usu-ers and whose business it is to loan money at the highest rates that can be obtained or promised, and many of these transactions, like those hereinbefore referred to, were with the affairs of this estate, as they well knew, and were breaches of trust in said Gray, as administrator; by reason of which said estate has been greatly injured and damaged; in fact they now hold all the judgements against said estate, except two small ones, which, complainants charge, they took control of at the request of said Gray and for his benefit, with a full knowledge of his conduct as admin-
46 istrator.

Complainants further show that since the resignation of said Erwin he has made none of the returns required of him by law at the time the law required them to be made, but has delayed all of them, varying in time from five days to two months, and complainants charge that the returns, when so made, were not full and complete returns as required by law, and for the year ending July 1st, 1881, although he has filed his resignation, he has made no return of any kind, by reason — which the heirs of said estate are kept in ignorance of its true condition, except as they have ascertained it from other sources; by which negligence and other negligence hereinbefore set fourth complainants are advised, believe, and charge that he has forfeited all claim to commissions or compensation.

Complainants, therefore, in consideration of the premises and forasmuch as they can only have adequate relief in a court of equity, *complainants* pray that the said defendants may answer the premises, but not upon oath or affirmation, the benefit whereof
47 is expressly waived by complainants, and that the said Frank P. Gray may be enjoined and restrained from all further proceedings in said administration, and from interfering with the affairs of said estate or collecting any of its assets or in any way disposing

of the same, and that said Miles G. Dobbins and said John Neal may be respectively restrained from levying or causing to be levied the said executions hereinbefore described, or advertising or causing to be advertised, or selling or causing to be sold, any of the property of said estate heretofore levied on by virtue of said *fi. fas.* or either of them, to wit, said *fi. fa.* in favor of John Neal *vs.* Thomas Tumlin and Frank P. Gray, administrator of Lewis Tumlin, said *fi. fa.* in favor of N. L. Angier, trustee, etc., *vs.* Frank P. Gray, administrator, etc., and said *fi. fas.* in favor of Silas Stephens *vs.* B. G. Pool & Co. and Frank P. Gray, adm'r, etc., and said *fi. fas.* in favor of Aaron Knight *vs.* B. G. Poole and Co. and against Frank P. Gray, administrator, &c., and that said Thomas Warren Akin be enjoined from collecting or disposing of said notes and mortgage in favor of said
48 Frank P. Gray, administrator, etc., given by said R. M. Young and P. M. B. Young, and that a receiver may be appointed for the property and assets of said estate, and that in the meantime and until the hearing of this application for injunction and receiver, such temporary injunction and restraining order may be granted as will protect said estate from loss.

Complainants further pray that an account may be taken by and under the direction of the court of the receipts and disbursements of said Frank P. Gray in the course of said administration, and of the waste set out in this bill and the waste committed by him, as well as the sums paid over by him to each of the heirs of said estate, and that complainants may have a decree for their distributive share in said estate against said Frank P. Gray and his sureties on his administration bonds aforesaid, and that the respective liabilities of said several securities may be ascertained and fixed by such decree.

Complainants further pray that an account may be taken of the usury paid by said Gray, administrator, to said Miles G.
49 Dobbins and said John Neal or either of them, and that a decree may be had against them for the same.

Complainants further pray that said execution in favor of said N. L. Angier, trustee, may be perpetually enjoined and the said John Neal may be required by decree of the court to enter the same satisfied.

Complainants also pray that they may have such other and further relief as the nature of this case may require.

And may it please your honors also to grant to complainants a writ of subpœna, to be directed to the said Frank P. Gray, Napoleon B. Tumlin, George H. Tumlin, Lula T. Lyon, John S. Leake, John W. Gray, William T. Wofford, Absalum P. Wofford, James M. Veach, Edwin M. Price, Noah King, Thomas W. Leake, A. C. Trimble, Joel H. Dyer, William W. Rich, Nelson Gilreath, John J. Howard, Robert L. Rogers, William I. Benham, Francis M. Ford, Miles G. Dobbins, Thomas Warren Akin, Mary L. Spencer, A. W. Mitchell, and John Neal, Henry C. Ramsour, administrator on the estate of Lewis R. Ransour, deceased, Henry C. Erwin, and John G. B. Erwin,
50 commanding them and each of them, at a certain time and under a certain penalty, to appear before this honorable court

and answer the premises and to stand to and abide by such further order, direction, and decree as this honorable court may make in this case.

And complainants will ever pray, etc.

GEORGE S. TUMLIN.
GRAHAM AND FOUTE,
Pl'ffs' Solicitors.

"EXHIBIT A."

GEORGIA, *Bartow County:*

Know all men by these presents that we, Frank P. Gray and N. B. Tumlin, principals; A. Johnson, W. T. Wofford, John W. Gray, James M. Veach, and E. M. Price, as sureties, are held and firmly bound unto the ordinary of said county and his successors in office in the sum of two hundred thousand dollars; to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators of us and each of us, firmly by these presents.

51 Subscribed with our hands and sealed with our seals this eleventh day of June, 1875.

The condition of the above obligation is such that whereas the above-bound Frank P. Gray and N. B. Tumlin has this day applied to J. A. Howard, ordinary of said county, for and has obtained temporary letters of administration of the goods and chattles, rights and credits, of Lewis Tumlin, deceased: Now, if the above-bound Frank P. Gray and N. B. Tumlin shall carefully collect and preserve from waste or loss all the goods, chattles, and effects of the said Lewis Tumlin, deceased, and shall make or cause to be made a true and perfect inventory of all such estate, and, the same being so preserved, do surrender up all such estate and effects with the inventory aforesaid unto the legal and proper administrators on or before the first Monday in August next, or so soon thereafter as the ordinary shall direct, with all his other actings and doings therein, and faithfully perform the trust reposed in him, then this obligation to be void; otherwise to remain in full force in law.

52

FRANK P. GRAY, [L. S.]
N. TUMLIN, [L. S.]
A. JOHNSON, [L. S.]
WM. T. WOFFORD, [L. S.]
JOHN W. GRAY, [L. S.]
JAMES M. VEACH, [L. S.]
EDWIN M. PRICE, [L. S.]
By WM. T. WOFFORD,
Att'y-in-Fact.

Tested and approved by—
J. A. HOWARD, *Ordinary.*

GEORGIA, *Bartow County:*

I, J. A. Howard, ordinary in and for said county, hereby certify that the within is a full, true, and complete copy of the temporary administrator's bond of F. P. Gray and Napoleon Tumlin, temporary administrators of Lewis Tumlin, deceased, as of file in the ordinary's office of said county.

Witness my hand and seal this Dec. 3d, 1880.
[SEAL.] J. A. HOWARD, *Ordinary.*

53 STATE OF GEORGIA, *Bartow County:*

Know all men by these presents that we, Frank P. Gray and John A. Erwin, as principals, and William T. Wofford, Abda Johnson, John W. Gray, James M. Veach, Noah King, Edwin M. Price, A. C. Trimble, Joel H. Dyer, W. W. Rich, James C. Wofford, Nelson Gilreath, John J. Howard, A. W. Mitchell, Thomas Stakely, R. L. Rogers, L. R. Ramsour, J. G. B. Erwin, Henry C. Erwin, W. I. Benham, John S. Leake, and Thomas Tumlin, as securities, are held and firmly bound and obligated unto the honorable the ordinary of said county, and his successors in office, in the sum of six hundred thousand dollars, to be paid to the said ordinary, his successors in office, or assigns; for which payment, well and truly to be made and done, we bind ourselves, jointly and severally, and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated at Cartersville this 2nd day of August, A. D. 1875.

The condition of the above obligation is such that if the
54 above-bound Frank P. Gray and John A. Erwin, administrators of the goods, chattles, and credits of Lewis Tumlin, deceased, do make a true and perfect inventory of all and singular the goods, chattles, and credits of the said deceased which have or shall come to the hands, possession, or knowledge of the said Frank P. Gray and John A. Erwin, or in the hands or possession of any other person or persons for them, and the same so made do exhibit in the court of ordinary of said county when they shall be thereunto required, and such goods, chattles, and credits do well and truly administer according to law, and make a just and true account of their actings and doings therein when required by the superior court or the ordinary for the said county, and all the rest of the goods, chattles, and credits which shall be found remaining upon the account of the said administrator, the same being first allowed by the said court, shall deliver and pay to such persons respectively as are entitled to the same by law; and if it shall hereafter appear that any last will and testament was made by the said deceased and be proved before the court, and the executors obtain a certificate
55 of the probate thereof, and the said Frank P. Gray and John A. Erwin do in such case, if required, render and deliver up

the said letters of administration, then this obligation to be void; else to remain in full force.

F. P. GRAY. [L. S.]
JOHN A. ERWIN. [L. S.]
WM. T. WOFFORD. [L. S.]
ABDA JOHNSON. [L. S.]
W. W. RICH. [L. S.]

The following persons, to wit:

JOHN W. GRAY, [L. S.]
JAMES M. VEACH, [L. S.]
NOAH KING, [L. S.]
A. C. TRIMBLE, [L. S.]
EDWIN M. PRICE, [L. S.]
JOEL H. DYAR, [L. S.]
By their att'y-in-fact, WM. T. WOFFORD, [L. S.]
JOHN S. LEAKE, [L. S.]
NELSON GILREATH, [L. S.]
J. C. WOFFORD, [L. S.]
J. J. HOWARD, [L. S.]
A. W. MITCHELL, [L. S.]
By J. J. HOWARD, *Att'y-in-Fact.*
THOMAS STAKELY, [L. S.]
ROBERT L. ROGERS, [L. S.]
By J. J. HOWARD, *Att'y-in-Fact.*
L. R. RAMSAUR, [L. S.]
J. G. B. ERWIN, [L. S.]
H. C. ERWIN, [L. S.]
56 By their att'y-in-fact, H. C. RAMSAUR.
W. I. BENHAM. [L. S.]
THOMAS TUMLIN. [L. S.]

Signed, sealed, and delivered in presence of—
J. A. HOWARD, *Ordinary.*

Approved August 2d, 1875.

J. A. HOWARD, *Ordinary.*

Filing.

Filed in office August 2d, 1875.

J. A. HOWARD, *Ordinary.*

STATE OF GEORGIA, *Bartow County:*

I, J. A. Howard, ordinary in and for said county, do hereby certify that the above and foregoing is a full, true, and complete copy of bond given by Frank P. Gray and John A. Erwin, as administrators of the estate of Lewis Tumlin, late of said county, deceased, as appears of file and record in the ordinary's office of said county.

Witness my hand and seal of office this December 14th, 1878.
[SEAL.] J. A. HOWARD, *Ordinary.*

57 GEORGIA, *Bartow County:*

Know all men by these presents that we, Frank P. Gray, principal, and Abda Johnson, Wm. T. Wofford, E. M. Price, Noah King, W. W. Rich, John W. Gray, John S. Leake, Nelson Gilreath, J. C. Wofford, T. W. Leake, securities, are held and firmly bound unto J. A. Howard, ordinary for said county, and his successors in office, in the just and full sum of one hundred and forty thousand dollars; for the payment of which sum to the said ordinary and his successors in office we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these *these* presents. Sealed with our seals and dated this second day of May, in the year eighteen hundred and seventy-six.

The condition of the above bond is such that whereas Frank P. Gray and John A. Erwin were heretofore, to wit, on the second day of August, A. D. eighteen hundred and seventy-five, appointed the administrators of the estate of Lewis Tumlin, late of said county, deceased, and gave bond and security in the terms of the
58 law, and whereas, on the twelfth day of April, A. D. 1876, said John A. Erwin filed an application before the ordinary of said county to be permitted to resign his office of administrator on account of his bad health and physical infirmity, and said application having been heard and his resignation allowed, and order having been passed by said court requiring said Frank P. Gray to give a new bond and security in the sum of one hundred and forty thousand dollars:

Now, if the above-bound Frank P. Gray shall well and truly administer the goods and chattles, rights and credits, lands and tenements, of the said Lewis Tumlin, deceased, which remains to be administered, and which have come to the hands, possession, or knowledge of the said Frank P. Gray, or in the hands or possession of any other person or persons for him, and the same do exhibit in the said court of ordinary, when he shall be thereunto required, and such goods, chattles, and credits do well and truly administer according to law, and do make a just and true account of his actings and doings therein when he shall be thereunto required by the court of ordinary of said county, and all the rest of
59 the goods, chattles, and credits which shall be found remaining upon the account of said administration, the same being first allowed by the court, shall deliver and pay to such person or persons, respectively, as are entitled to the same by law; and if it shall hereafter appear that any last will and testament was made by said deceased and the same be proved before the court and the executor obtain a certificate of probate thereof and the said Frank P. Gray do in such case, if required, render and deliver up the said

letters of administration, then this obligation to be void; else to remain in full force.

FRANK P. GRAY. [L. S.]
ABDA JOHNSON. [L. S.]
WM. T. WOFFORD. [L. S.]
EDWIN M. PRICE. [L. S.]
NOAH KING. [L. S.]
WM. W. RICH. [L. S.]
J. W. GRAY, [L. S.]
By W. T. WOFFORD,
Att'y-in-Fact.
J. C. WOFFORD. [L. S.]
JOHN S. LEAKE, [L. S.]
By JOHN W. WOFFORD,
Att'y-in-Fact.
NELSON GILREATH. [L. S.]
THOMAS W. LEAKE, [L. S.]
By JOHN W. WOFFORD,
Att'y-in-Fact.

Attested and approved by—
J. A. HOWARD, *Ordinary.*

60 *Filing.*

Filed in office May 2d, 1876.

J. A. HOWARD, *Ordinary.*

STATE OF GEORGIA, *Bartow County:*

I, J. A. Howard, ordinary in and for said county, do hereby certify that the above and foregoing is a full, true, and complete copy of the bond given by Frank P. Gray, as sole administrator of Col. Lewis Tumlin, late of said county, deceased (dated 6th May, 1876), as appears of file and record in the ordinary's office of said county.

Witness my hand and seal of office this Dec. 14th, 1878.

[SEAL.] J. A. HOWARD, *Ordinary.*

61 GEORGIA, *Bartow County:*

Know all men by these presents that we, Frank P. Gray, principal, and Nelson Gilreath, A. P. Wofford, Thomas Tumlin, Abda Johnson, Noah King, F. M. Ford, John S. Leake, Thomas W. Leake, and John W. Gray, securities, are held and firmly bound unto J. A. Howard, ordinary of said county, and his successors in office, in the just and full sum of one hundred and forty thousand dollars; for the payment of which sum to the said ordinary and his successors in office we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 13th day of October, A. D. 1877.

The condition of the above bond is such that whereas Frank P. Gray gave bond and security as the sole administrator of Lewis Tumlin, deceased, for the sum of one hundred and forty thousand dollars, said bond dated 2nd day of May, A. D. 1876, his co-admin-

istrator, John A. Erwin, having resigned his trust, which resignation was allowed by order of the court of ordinary of said
62 county; and

Whereas William T. Wofford, James C. Wofford, and William W. Rich, three of the securities for the said Frank P. Gray, as administrator aforesaid, on said administrator's bond dated 2nd day of May, 1876, filed an application for relief from all future liability on said administrator's bond in the court of ordinary of said county on the 23d March, 1877, making charges of mismanagement, &c.; and

Whereas at the October term, 1877, *of* said Wm. T. Wofford, James C. Wofford, and W. W. Rich withdrew their charges of mismanagement and claimed their release from liability on said bond as matter of right, and the said court of ordinary at said term having passed an order relieving said securities from all future liability on said bond and requiring said Frank P. Gray to give new bond and security in the sum of one hundred and forty thousand dollars:

Now, if the above-bo-nd Frank P. Gray shall well and truly administer all the goods and chattles, rights and credits, lands and tenements, of the said Lewis Tumlin, deceased, which remains
63 to be administered, and which have or shall come to the hands, possession, or knowledge of the said Frank P. Gray or in the hands or possession of any other person or persons for him, and the same do exhibit in the said court of ordinary when he shall be thereunto required, and such goods, chattles, and credits do well and truly administer according to law, and make a just and true account of his actings and doings therein when he shall be thereunto required by the court of ordinary of said county and all the rest of the goods, chattles, and credits which shall be found remaining upon the account of said administration, the same being first allowed by the court, shall deliver and pay to such person or persons, respectively, as are entitled to the same by law, and if it shall hereafter appear that any last will and testament was made by said deceased, and the same be proven before the court and the executor obtain a certificate of probate thereof, and the said Frank P. Gray do in such case, if required, render and deliver up said letters of adminis-
64 tration, then this bond to be void; else to remain in full force.

FRANK P. GRAY. [SEAL.]
N. GILREATH. [SEAL.]
A. P. WOFFORD. [SEAL.]
THOMAS TUMLIN, [SEAL.]
By his att'y-in-fact A. P. WOFFORD.
A. JOHNSON. [SEAL.]
NOAH KING, [SEAL.]
By his att'y-in-fact ABDA JOHNSON.
F. M. FORD. [SEAL.]
JOHN S. LEAKE. [SEAL.]
THOMAS W. LEAKE. [SEAL.]
JOHN W. GRAY, [SEAL.]
By his att'y-in-fact A. P. WOFFORD.

Attested and approved by—
J. A. HOWARD, *Ordinary.*

Filing.

Filed in office Oct. 13th, 1877.

J. A. HOWARD, *Ordinary.*

STATE OF GEORGIA, *Bartow County:*

I, J. A. Howard, ordinary in and for said county, do hereby certify that the above and foregoing is a full, true, and complete copy of the bond given by Frank P. Gray, as sole administrator of the estate of Col. Lewis Tumlin, late of said county, deceased (bond dated 13th Oct., 1877, & filed same day), as appears of file in the ordinary's office of said county.

Witness my hand and seal of office this December 14th, 1878.

[SEAL.] J. A. HOWARD, *Ordinary.*

65 GEORGIA, *Bartow County:*

Know all men by these presents that we, Frank P. Gray, as principal, and A. P. Wofford, John S. Leake, Thomas W. Leake, F. M. Ford, John W. Gray, N. Gilreath, and Abda Johnson, as securities, are held and firmly bound unto J. A. Howard, ordinary of said county, and his successors in office, in the just and full sum of one hundred and forty thousand dollars; for the payment of which sum to the said ordinary and his successors in office we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 6th day of May, 1878.

The condition of the above bond is such that whereas Frank P. Gray gave bond and security as the sole administrator of Lewis Tumlin, deceased, for the sum of one hundred and forty thousand dollars, said bond dated 13th day of October, 1877; and whereas Noah King, one of the sureties for the said Frank P. Gray, as administrator as aforesaid, on said administrator's bond, dated
66 13th October, 1877, filed an application for relief from all future liability on said administrator's bond in the court of ordinary, in said county, on the 12th day of February, 1878, on account of extreme old age and fe-ble health; and whereas at the March term of said court of ordinary, 1878, said court of ordinary passed an order relieving said Noah King as security from all future liability on said bond, and requiring said Frank P. Gray to give new bond and security in the sum of one hundred and forty thousand dollars:

Now, if the above-bound Frank P. Gray shall well and truly administer all the goods and chattles, rights and credits, lands and tenements of the said Lewis Tumlin, deceased, which remains to be administered, and which have or shall come to the hands, possession, or knowledge of the said Frank P. Gray or in the hands or possession of any other person or persons for him, and the same do exhibit in the said court of ordinary when he shall be thereunto

required, and such goods, chattles, and credits do well and truly administer according to law, and do make a just and true
67 account of his actings and doings therein when he shall be thereunto required by the court of ordinary of said county, and all the rest of the goods, chattles, and credits which shall be found remaining upon the account of said administration, the same being first allowed by the court, shall deliver and pay to such person or persons, respectively, as are entitled to the same by law; and if it shall hereafter appear that any last will and testament was made by said deceased, and the same being proven before the court and the executor obtain a certificate of the probate thereof, and the said Frank P. Gray do in such case, if required, render and deliver up said letters of administration, then this bond to be void; else to remain in full force.

FRANK P. GRAY [SEAL.]
A. P. WOFFORD. [SEAL.]
JOHN S. LEAKE. [SEAL.]
THOMAS W. LEAK, [SEAL.]
By A. P. WOFFORD,
Att'y-in-Fact.
F. M. FORD. [SEAL.]
JOHN W. GRAY, [SEAL.]
By his att'y-in-fact, A. P. WOFFORD.
N. GILREATH. [SEAL.]
A. JOHNSON. [SEAL.]

Attested & approved by—
J. A. HOWARD, *Ordinary.*

68 *Filing.*

Filed in office June 3d, 1878.

J. A. HOWARD, *Ordinary.*

STATE OF GEORGIA, *Bartow County:*

I, J. A. Howard, ordinary in and for said county, do hereby certify that the above and foregoing is a full, true, and complete copy of the bond given by Frank P. Gray as sole administrator of the estate of Lewis Tumlin, late of said county, deceased (bond dated 6th May, 1878), as appears of file in the ordinary's office of said county.

Witness my hand and seal of office this December 14th, 1878.

[SEAL.] J. A. HOWARD, *Ordinary.*

69 GEORGIA, *Bartow County:*

To the court of ordinary of said county:

The petition of Frank P. Gray, administrator of Lewis Tumlin, deceased, late of said county, shows that he is such administrator at this time, and that he desires to resign his office as such administrator on said estate for the reason that he desires to remove beyond the limits of said county and State.

And your petitioner further shows that he has procured James C. Wofford, of said county, a suitable person to carry out said administration, and whose willingness to accept the trust is herewith made known to the court of ordinary.

And your petitioner prays that the said James C. Wofford may be appointed and cited to appear, with the heirs-at-law and distributees of the said Lewis Tumlin, deceased, to show cause, if any they have, why the said James C. Wofford should not be appointed as such administrator and your petitioner discharged from said administration in terms of the law in such cases.

70 And your petitioner pray- that copies of this application to resign may be served on all of the heirs and distributees of the said Lewis Tumlin, with process attached, requiring them to be and appear at the next term of the court of ordinary, to be held on the first Monday in July, 1881, to show cause why petitioner's application should not be granted as prayed for.

This June 17th, 1881.

AKIN & AKIN,
A. P. WOFFORD,
Att'ys for Applicant.

Filing.

Filed in office June 18th, 1881.

J. A. HOWARD, *Ordinary.*

STATE OF GEORGIA, *Bartow County:*

To Mary L. Spencer, formerly Mary L. Tumlin; Napoleon Tumlin, Ada S. Rice, Lula T. Lyon, Cora M. Gray, George H. Tumlin, and Lewis T. Erwin, next of kin and heirs-at-law of Lewis Tumlin, deceased, and James C. Wofford, selected to be appointed adm'r:

71 You and each of you are hereby notified and cited to be and appear at a court of ordinary to be held in and for said county at the court-house in Cartersville on the first Monday in July, 1881, by 10 o'clock a. m. to show cause, if any you have, why the resignation of F. P. Gray, adm'r of Lewis Tumlin, deceased, shall not be allowed as prayed for in the foregoing petition and that James C. Wofford shall not be appointed adm'r. in his stead; and it is ordered by the court that a copy of this citation and the foregoing petition be served upon each of the above-named persons by the sheriff ten days before said court.

Witness my hand and official signature this June 18th, 1881.

J. A. HOWARD, *Ordinary.*

Service.

Served Napoleon Tumlin, J. L. Rice, Geo. H. Tumlin, J. C. Wofford, each in person, with a copy of the within.

June 20th, 1881.

A. M. FRANKLIN, *Sh'ff.*

Served Lula T. Lyon in person with a copy of the within. June 21st, 1881.

JNO. A. GLADDEN,
Dept'y Sh'ff.

72 Served Mrs. Mary L. Spencer, formerly Mrs. Mary L. Tumlin, in person with a copy of the within.
June 23d, 1881.

THOS. S. WARD,
Dept'y Sh'ff.

STATE OF GEORGIA, *Bartow County:*

I, J. A. Howard, ordinary in and for said county, do hereby certify that the above and foregoing two pages contain a full, true, and complete copy of the application of F. P. Gray, adm'r of Lewis Tumlin, deceased, to be permitted to resign, as appears of file in the ordinary's office of said county.

Witness my hand and seal of office this July 11th, 1881.

[SEAL.] J. A. HOWARD, *Ordinary.*

Filing of Bill.

Filed in clerk's office July 12th, 1881.

A. E. BUCK, *Clerk.*

73 *Subpœna.*

UNITED STATES OF AMERICA, *Northern District of Georgia:*

JAMES L. RICE and His Wife, ADA S. RICE, Complainant-,
vs.
FRANK P. GRAY and CORA M. GRAY *et al.*, Defendant-. } In Equity.

The President of the United States to Frank P. Gray, Cora M. Gray, Napoleon B. Tumlin, Geo. H. Tumlin, Lula T. Lyon, John S. Leak, John W. Gray, Wm. T. Wofford, Absalom P. Wofford, James N. Veach, Edwin M. Price, Noah King, Thomas W. Leak, A. C. Trimble, Joel H. Dyer, Wm. W. Rich, Nelson Gilreath, John J. Howard, Robert L. Rogers, Wm. J. Benham, Miles G. Dobbins, Francis M. Ford, Thomas W. Akin, Mary L. Spencer, A. W. Mitchell, John Neal, Henry C. Ransour, adm'r, etc., Henry C. Erwin, and John G. Erwin:

For certain causes offered before the judges of the circuit court of the United States for the northern district of Georgia, in equity, you and each of you are hereby commanded and strictly enjoined that, laying all other matters aside and notwithstanding any other excuse, you personally be and appear at the clerk's office of said
74 court, in the city of Atlanta, at rules, to be had on the first Monday in September next, to answer to those things which shall then and there be objected to you by the complainants in their

said bill of complaint, and to do further and receive what the said court shall have considered in this behalf, and this you may in no wise omit under penalty of five hundred dollars, and have here this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States, this 12th day of July, in the year of our Lord one thousand eight hundred and eighty-one.

[SEAL.] A. E. BUCK, *Clerk.*

MEMORANDUM.—The defendants are required to enter their appearance in the suit above stated, in the clerk's office, on or before the day at which this writ of subpœna is returnable; otherwise, the bill may be taken *pro confesso.*

A. E. BUCK, *Clerk.*

Service.

We hereby acknowledge due and legal service of this subpœna and waive copy and service by the marshal.

This 12th July, 1881.

LULA T. LYON,
75 N. B. TUMLIN,
GEORGE H. TUMLIN,
MARY L. SPENCER,
By their attorneys, G. S. TUMLIN AND
E. D. GRAHAM.

U. S. MARSHAL'S OFFICE, *Aug. 9th,* 1881.

I hereby certify that I have executed the within writs by serving a copy personally on—

John J. Howard, on the 6th, at Cartersville.
Nelson Gilreath, " " "
A. C. Trimble, " 8th, near Adairsville.
Thos. W. Leak, " 6th, " Cartersville.
Edwin M. Price, " 8th, " Adairsville.
Noah King, " " " "
James N. Veach, " " " "
John S. Leak, " 6th, " Cartersville.
Frank P. Gray, " " " "
Henry C. Ramsour, " 8th, " Fairmount.
Henry C. Erwin, " " " "
Robert L. Rogers, " " " Rodgers' Station.
Wm. J. Benham, " " " "
Francis M. Ford, " " " Cartersville.
A. W. Mitchell, " 5th, Atlanta.
John G. B. Erwin, " 8th, Fairmount.

And, by leaving copy at the last and most notorious place of abode—

Joel H. Dyer, on the 8th, near Adairsville.
Absolum P. Wofford, on the 6th, near Cartersville.
76 Wm. T. Wofford, on the 8th, near Cassville.
John W. Gray, on the 8th, near Adairsville.

Cora M. Gray, on the 6th, near Cartersville.
Thomas W. Akin, on the 6th, near Cartersville.
John Neal, on the 6th, near Atlanta.

JAMES LONGSTREET, *U. S. M.*,
By J. G. LONGSTREET, *D'p. M.*

Subpœna- W. W. Rich by leaving a copy of this original writ at his most notorious place of abode, 7 miles E. Cartersville, this 9th Aug., 1881. Subpœna- Miles G. Dobbins by leaving copy of this original writ at his most notorious place of abode, 6 miles W. Cartersville, on this 9th Aug., 1881.

JAMES LONGSTREET, *U. S. M.*,
By W. B. FITZSIMONS, *Dep. Mar.*

Filing.

Returned into clerk's office and filed August 10th, 1881.
A. E. BUCK, *Clerk.*

77 *Bill, etc.*

In the Circuit Court of the United States for the Northern District of Georgia.

JAMES L. RICE and WIFE *vs.* FRANK P. GRAY *et al.*

The joint answer of Napoleon B. Trumlin, George H. Tumlin, Mary L. Spencer, and Lula T. Lyon, defendants.

These defendants, for answer to so much and such parts of complainants' bill of complaint as they are advised and believe it is material or necessary for them to make answer unto, say—

That they are each of them heirs-at-law of said Lewis Tumlin, deceased, as set out in complainants' bill, and the said Napoleon B. Tumlin admits that he was temporary administrator on said estate with said Frank P. Gray, but says that none of the assets or property of said estate ever came into his hands, as temporary administrator, and that said Frank P. Gray had the actual control, possession, and custody of all of the effects of said Lewis Tumlin, deceased, and that they all delivered and turned over to said Frank P. Gray and John A. Erwin, as permanent administrators.

78 Defendants, further answering, say that they have each received from estate the sum of twenty-four thousand dollars, which was distributed in kind, as set out in complainants' bill, and they answer each for themselves that since that time from said administrator they have received as follows, to wit:

The said defendant, Napoleon B. Tumlin, nothing.

The said defendant, George H. Tumlin, about eight hundred dollars.

The said defendant, Mary L. Spencer, — dollars.

The said defendant, Lula T. Lyon, about eight hundred dollars. The precise amount neither of them are now able to state.

For further answer these defendants say that, according to the best of their knowledge, information, and belief, all the other allegations and charges contained in complainants' bill are substantially correct, and they are advised and believe, as to the matters and things set out by said complainants against said Frank P. Gray and the several securities upon his several bonds, as administrator, and against the other defendants to said bill, they have interest adverse to said complainants, but a common interest with them in the estate
79 of said Lewis Tumlin, deceased, and they join in their charges and allegations in said bill against the other defendants thereto and unite in the prayers in said bill contained; and each of these defendants further prays that an account may be taken of his distributive share in said estate and of the amount received by each of them from said Frank P. Gray, administrator, and that a decree may be had in their favor, respectively, against said Gray and his securities for the amounts that may be due to them.

And defendants will ever pray, &c.

G. C. TUMLIN,
GRAHAM & FOOTE,
Sol'rs for N. B. and G. H. Tumlin, Mary L. Spencer, and Lula T. Lyon.

GEORGIA, *Fulton Co.:*

Personally came Thomas J. Lyon, agent for his wife, Lula T. Lyon, and Napoleon Tumlin, before the undersigned officer,—on oath says that the answer hereto attached is true.

THOS. J. LYON.
N. TUMLIN.

Sworn to and subscribed before me this Oct. 27, 1881.
A. E. BUCK, *Clerk.*

Filing.

Filed Sept. 5, 1881.

A. E. BUCK, *Clerk.*

80 *Answer of Gray and his Sureties and Dobbins and Neal.*

In the Circuit Court of the United States for the Northern District of Georgia. In Equity.

JAMES L. RICE & His Wife, ADA S. RICE,
vs.
FRANK P. GRAY *et als.*

The joint answer of F. P. Gray and his secureties and of M. G. Dobbins and John Neal, filed this 1st day of October, 1881, and made without waiving any rights of demurrer to the bill for want of proper parties and other ground of demurrer.

The complainants in the above-stated cause having waived the defendants' answer under oath and taken upon themselves the burden of proving the facts and allegations of their bill, these defendants

do not feel disposed in any way to lessen that burden, and they therefore deny all and any statement and allegation made in said bill of any kind whatever, and insist that complainants shall be held to strict proof of the same.

They deny all charges made in said bill of any maladmin-
81 istration or waste by said defendants, Frank P. Gray, or any double charge or overcharge or of failure to do his duty by said Gray in the matter relating to the estate of Lewis Tumlin, and especially do they deny all and every allegation of fraud or negligence by the said Gray.

They especially deny each and all of the following allegations of said bill, to wit:

1. That allegation on page 13 of said bill in reference to his charge of 2½ per cent. commission on the divisions of the land and in reference to commissions on the first return on growing crops, and each and every allegation that said Gray has charged or claimed any illegal commissions of any kind whatever, and they deny that said Gray has credited himself with three thousand four hundred and thirty-three (3,433.00) dollars as commissions without authority of law, or that he has charged or credited himself with any other sum as commission without authority of law.

2nd. That charge on page 16 of said bill in reference to the two notes on A. R. Hudgins and that Gray failed to account for the money collected thereon.

82 3d. That charge on the same page in reference to his failure to account for money collected from Isham Alley.

4th. That charge on the same page that Gray collected of Randolph Borders money which he failed to account for.

5th. That charge on the same page that Gray collected of S. A. Pullam one thousand dollars, for which he never accounted in his returns.

6th. That charge on page 17 that Gray has collected rents for the Floyd county farm which he has failed to account for.

7th. That charge on page 17 that Gray collected or ought to have collected twelve hundred dollars, or any other sum, the value of twenty-five bales of cotton, rent for the Cresswell place, which he has not accounted for.

8th. That charge on same page that Gray has collected and not accounted for any rent on a farm in Alabama.

9th. That charge on page 18 with reference to any transaction with Francis M. Ford.

83 10th. That charge on same page with reference to the firm of B. Pool and Co., and with reference to B. G. Pool.

11th. That charge on page- 19, 20, and 21 in reference to said Gray having filed a bill against Pool and Peacock, and anything therein stated with reference to said bill and with reference to the appointment of a receiver, and to all the alleged actings and doings of said receiver, and in reference to the whole of said transactions with said Pool and Pool and Peacock, or with reference to the solvency of either or collection of any money from either of them that has not been accounted for, or with reference to any judge-

ments obtained against Gray as administrator of Tumlin by any person in the United States court for the northern district of Georgia when he had means in his hands to pay off and discharge the debt.

12th. Also that charge on page 22 with reference to the transaction with Miles G. Dobbins, or any usury paid or contracted to be paid to him.

13th. Also that charge on page 23 with reference to a bill
84 filed by Lula T. Lyons against said Gray any every statement by complainant with reference to said bill and the result thereof.

14th. Also the charges on page 26 with reference to the levy on the lands of the estate by Dobbins and by Neal, and what was done or said or failed to be said by said Gray in reference thereto, and what said complainants did or said in reference thereto, and everything in said bill charged with relation to said levy or levies, or in relation to either Dobbins or Neal.

15th. Also that charge on page 28 in reference to Thomas Tumlin and Napoleon B. Tumlin, and the payment of any money by either of them to said Gray or any agreement between them, and everything in said bill stated with regard to said Napoleon B. Tumlin, Thomas Tumlin, John Neal, and the said Gray.

16th. Also that allegation on page 30 in reference to N. L. Angier, and the judgement obtained by him or any transaction between him and the said Gray or the said John Neal, and everything therein stated with reference to any judgement in favor of *of*
85 said Angier or any action of the said Gray thereabout.

17th. That charge on page 33 with reference to certain notes of J. W. Clayton and anything charged with reference to said notes or with any sale of land connected therewith and everything charged therein with reference to said land or notes.

18. That allegation on page 33 with reference to John W. Wofford or any notes of his or mortgage and everything with reference to said Wofford or his solvency or any payments made to him or of any mortgage made by him, or of any conduct of said Gray with reference to said mortgage, or with A. P. Wofford, his attorney, or of any proceedings to foreclose said mortgage, and everything stated in said bill with reference to said A. P. Wofford, or any connection or transaction between the said Gray and the said Wofford in reference to said mortgage.

19th. Also that charge on page 36 in reference to John W. Wofford and Abda Johnson, Stancel and Wofford, and of any
86 transaction and agreement between said Gray and them or either of them, or any payments made by said Gray to them or either of them, or any transactions between them.

20th. Also that charge made on page 38 of said bill with reference to the failure of said Gray to account for the crop of cotton raised in 1875, or any failure of said Gray with relation thereto.

21st. That charge on page 38 with reference to the newspaper and everything stated with reference thereto or the acts of said Gray as to the sale of said paper or the purchase thereof.

22d. Also that charge on page 39 with reference of said Tumlin

in the Euharlee flour mills and what said Gray did or said in relation thereto.

23d. Also that general charge on page 40 of said bill of complaint to the effect that Gray has collected eighty-seven thousand ($87,000) dollars and only paid out twenty-five thousand dollars, and that said Gray had made illegal charges for expenses, or that he is indebted to said estate thirty-five thousand dollars.

87 24th. Also that charge on page 41 in reference to what said Gray was worth at the death of said Lewis Tumlin or what Gray's father was worth and what Cora Gray was worth, and what she has received and what Frank P. Gray and she invested in the Oathcaloga mills, and as to what the said Cora or the said Frank Gray — in a mortgage on said mill.

25th. Also that charge on page 42 that said Gray has invested a sum of money in a Mississippi plantation.

26th. Also that charge and all allegations, begin-ing on page 42 of said bill and ending on page 43, with reference to the bond and security and their solvency stated or the insolvency of said bonds and of any of the secureties thereon.

27th. Also that charge on page 43 in regard to the bank stock and its nominal or real value.

28th. Also that charge in relation to the wild lands remaining unsold and the value thereof, and other real estate and its

88 appraised value, on p. 44 of said bill.

29th. Also that allegation on same page in regard to pending suits in favor of said estate in the superior courts of Bartow county, and pending suits against said estate that could — been tried long since and disposed of, if said Gray had sought with proper dil*l*igence to do so, and everything stated in relation to said suits and the liability of said estate and the solvency of the parties against whom they are pending, in that Gray has delayed any such cause or causes in order to postpone the final settlement of the estate.

30th. Also that charge on page 45, in relation to said Gray's absence from Georgia or the selling the real estate of Cora Gray in Georgia, or of said Frank Gray or either of them, and sending away a portion of their personal property, and in reference to his filing his resignation as administrator and his reasons for so doing, and suggestions as to who his successor should be, and all statements made in reference to said matter or matters or of the

89 parties concerned.

30½. Also all allegations on page- 46 and 47 in relation to the necess*ary* for a receiver or an injunction.

31st. Also the allegation on p. 47 in regard to Gray's extravagance and his living in a manner not justified by his income, and in relation to Gray's management of the estate for his personal benefit and using its assets, and to his transactions with Dobbins and Neal or either of them and their business, and in regard to charges on page 48 in regard to said estate being injured, and to Dobbins and Neal holding all the judgements against the estate except two small ones at the request and for the benefit of Gray.

32d. And also the charges on page 48 in reference to the returns of said Gray since Erwin's resignation not being made on the proper days and delaying the same, and in regard to his return for the year 1881, and in regard to Gray's forfeiting all claim for compensation by negligence.

90 And defendants deny each and every material allegation in complainants' bill of complaint not hereinbefore specially denied, and they require that complainants shall be held to strict legal proof of each and every allegation in their said bill, and they submit to the judgment of the court on the charges and proofs as they shall be made on the trial.

This is the answer of defendants Frank P. Gray and of the several persons sued in the bill as his securities and of Miles G. Dobbins and John Neal.

McCAY AND ABBOTT,
JOHN D. CUNNINGHAM,
J. L. BROWN,
Sol's for Defendants.

Filing.

Filed October 3d, 1881.

A. E. BUCK, *Clerk.*

91 *Answer of Securities on Adm'r Bond of Gray and Erwin.*

In U. S. Circuit Court for the Northern District of Georgia.

JAMES L. RICE and His Wife, ADA S. RICE,
vs.
FRANK P. GRAY *et al.*

Bill, etc.

And now, for separate answer to the above-stated bill, come all the securities upon the alleged administration bond of John A. Erwin and Frank P. Gray, who, still insisting upon any and all demurrers and pleas — their behalf filed, *and* say—

1st. That they pray complainants may be held to strict and absolute proof of the bond of John A. Erwin and Frank P. Gray, administrators of Lewis Tumlin.

2nd. These defendants deny each and every charge of maladministration alleged by complainants to have been committed by said Erwin and Gray or either of them during the period of their joint administration.

3d. In April, 1876, John A. Erwin, having become enfeebled by disease and bodily infirmity, and being thus incapacitated from the further discharge of the duty of administrator of Lewis Tumlin's estate, petitioned the ordinary of Bartow county for leave to resign.

92 Citation thereupon issued, and was regularly served upon all the heirs-at-law of Lewis Tumlin, and they or a portion of them appeared and contested the truth of said Erwin's petition, but the issue so formed was tried and found in favor of said Erwin. The said Gray thereupon gave a new bond as administrator,

and the said Erwin settled with said Gray and accounted to him for every property of every kind belonging to said estate, and took the said Gray's proper receipt therefor and filed the same in office of the said ordinary of Bartow county, who thereupon issued an order upon June 12th, 1876, discharging said Erwin as administrator of Lewis Tumlin and releasing him and these defendants from any liability on account of any future mismanagement of said Lewis Tumlin's estate by said Frank P. Gray, whom the said ordinary in said order appointed sole administrator of said estate.

These defendants deny any and all statements and charges in complainants' bill which give any other account of said Erwin's resignation and which assign any other reason for said resignation than these aver-ed by these def'd'ts above.

93 This answer is made by the securities upon said Erwin and Gray's alleged administration bond and in their character as such securities, and is filed as additional answer to the answer filed by other solicitors in their behalf, as more particularly stating the facts which go to limit and determine the period of their liability on said alleged administration bond.

THOMAS WARREN AKIN,
Sol. for Def'd'ts.

Filing.

Filed in clerk's office Oct. 3d, 1881.

A. E. BUCK, *Clerk.*

94 *Demurrer to Bill.*

JAMES L. RICE and His Wife, ADA S. RICE,
vs.
FRANK P. GRAY *et als.*
} In Equity.

The defendants in the above-stated case demur to the complainants' bill, and for cause of demurrer say:

1st. That James L. Rice is not a proper party complainant in said bill, as by the statements of said bill it appears that he had, under the laws of Georgia, no interest in the estate of the intestate, the said Lewis Tumlin.

2nd. That none of the parties made defendants in said bill, as securities on the several bonds of the defendant Gray, sued as the administrator of said Lewis Tumlin, are proper parties defendant to said bill.

3d. Said bill shows upon its face — the circuit court of the United States for the northern district of Georgia has no jurisdiction of an original bill in the matter complained of, since at and before the filing of said bill proceedings were pending before the ordi-

95–7 nary of the county of Bartow for the resignation of said Gray, as administrator, and the appointment of a successor, which, under the laws of Georgia, involves a full inquiry into and decision by said ordinary of all the matters and things complained of in said bill.

McCAY AND ABBOTT,
Def'd'ts' Sol'rs.

We do hereby certify that the foregoing demurrer filed by the defendants in the cause stated in said demurrer is, in our opinion, well founded in point of law.

McCAY & ABBOTT,
Sol's for Def'd'ts.

UNITED STATES OF AMERICA, *Northern District of Georgia:*

In person before me, A. E. Buck, a United States commissioner, comes Frank P. Gray, one of the defendants in the case recited in the foregoing demurrer, and on oath says that said demurrer is not interposed for delay.

FRANK P. GRAY.

Sworn to and subscribed before me this Oct. 3d, 1881.
A. E. BUCK, *Clerk.*

Filing.

Filed in office Oct. 3d, 1881.

A. E. BUCK, *Clerk.*

* * * * * * *

98 *Order Overruling Demurrer.*

In Open Court, March Term, 1882. In Equity.

JAMES L. RICE *et al. vs.* FRANK P. GRAY *et al.*

The Honorable Don A. Pardee, judge of said court, having in vacation, to wit, on the 14th of November, 1881, passed an order overruling a demurrer filed in said case and directing that a decree be taken at this term overruling said demurrer—

99–108 It is adjudged and decreed that said demurrer be overruled on all the grounds taken therein.

This March 14th, 1882.
By the court:

ALECK BOARMAN,
U. S. Judge.

CANDLER AND THOMSON
E. D. GRAHAM,
Sol'r for Compl'ts.

* * * * * * *

109 *Order of Reference to Special Master.*

JAMES L. RICE *et al.*
vs.
FRANK P. GRAY, Adm'r., *et al.* } In Equity.

Bill for injunction, relief, etc.

Whereas complainants in the above-stated case filed their bill in said cause to the fall term, 1881, of this court, alleging mismanagement, waste, and fraud on the part of said administrator, and praying for injunction, the appointment of a receiver, and reference to a

master; and whereas the prayer for injunction and the appointment of a receiver has been heard and the injunction granted and a receiver appointed, a demurrer to said bill having been heard and overruled; and whereas said cause is now ready for reference, and counsel for complainants and defendants in open court have expressed a desire that the order of reference be full:

It is ordered that said cause be referred to E. N. Broyles, Esq'r, as special master, who is directed to inquire into and report upon each and every question, whether of law or fact, raised by or included in the pleadings in said cause as they may exist at the time
110–119 the said master enters on the hearing; and the said master is specially required to take and state an account, showing—

1st. The receipts and disbursements legally made during the administration of said estate, distinguishing the transactions during temporary administration, joint administration, and sole administration.

2nd. The disbursements, if any, illegally made, and the credits, if any, illegally taken.

3d. The outstanding claims against said estate, their nature, and the liability of the estate therefor.

4th. The amount of the distributive share in the estate of deceased to which each of the heirs is entitled; the amount received by each distributee, and the amount still due each distributee.

The said master is further directed to report his finding as to the liability of the several sureties, or any of them, in connection with his statement as to what is still due each distributee, which may be done by a note appended to said statement.

March 20th, 1882.

DON A. PARDEE, *Judge.*

Filing.

Filed in clerk's office March 20th, 1882.

A. E. BUCK, *Clerk.*

* * * * * * *

120 *Amendment to Bill.*

JAMES L. RICE and ADA S. RICE *vs.* FRANK P. GRAY and Others.

Bill, &c., for relief, injunction, and receiver.

The petition of complainants in the above case shows that when their original bill was filed they were informed and believe the following state of facts to exist, to wit: That John A. Erwin had, in April, 1876, applied to the ordinary of Bartow county, Georgia, for leave to resign his office as a co-administrator on the estate of Lewis Tumlin, deceased; that orators in connection with N. B. Tumlin, G. H. Tumlin, Mary L. Spencer, and Lula T. Lyon had objected to said resignation, and upon the trial of their caveat to said application for leave to resign the ordinary had allowed said resignation and all the other caveators heard had appealed from that decision, except orators, who gave the matter no further attention, and were

informed and believed that said resignation had been allowed, and they have all the time, until the filing of their bill, thought
121 and believed that said Erwin had resigned his trust and his resignation had been allowed and accepted by the court. They further say that during all that time they were advised and believe and still are advised and believe that said resignation, even if duly accepted, could not prejudice their rights or in any way release the sureties on the joint administration bond of said Gray and Erwin, and in their original bill such averments and allegations were made as they thought necessary to set out this fact. But they further show that since the reference of this case and upon and during the hearing of the same before the master appointed by the court in said case defendants have put in evidence the record of said Erwin's resignation and the proceedings had upon the appeal in the superior court of said county, and to which orators had no access, the original papers, as orators are informed and believe, not being on file, by which it appears that said Erwin's resignation has never been in fact or in law allowed, and it appears he
122 is now one of the legal administrators on said estate. Complainants aver that, not being parties to said appeal, they had not given any attention to it, and did not know what had been done in it, except that the jury had found against the appeal, and they believed that all other legal steps had been taken to give effect to the verdict. They now during this trial have first learned that they were not and aver that no judgement was entered, and the papers in said case are not on file in the clerk's office of the superior court; they could not learn it earlier. These facts first came to their knowledge during the hearing before the master, and in the absence of any judge of said court qualified to act therein or allow an amendment in said case. Complainants therefore pray they may be allowed to amend their original bill upon such terms as the court may require, and set out the facts and pray relief accordingly.

Complainants propose to amend their bill as follows, to
123 wit: By an averment that John A. Erwin, though not a party to said bill by reason of the fact that he resides without the jurisdiction of the court, is not only bound as the securety of said Frank P. Gray in common with all the other sureties of said Gray and Erwin on the first administration bond, as claimed in the original bill, and is still in law one of the administrators of said estate, and has never legal-y resigned his trust as a co-administrator with Frank P. Gray on said estate, and that complainants are entitled to relief accordingly against them and all the sureties on all the administration bonds on said estate, and they pray relief accordingly.

G. S. TUMLIN,
GRAHAM AND FOUTE,
J. B. CONYERS,
For Compl'ts.

GEORGIA, *Bartow County:*

You, James L. Rice, do swear that the facts stated in the foregoing petition are true.

J. L. RICE, *Compl't.*

Sworn to and subscribed before me this Sept. 18, 1882.

AARON COLLINS,
U. S. Com'r.

124 *Bill.*

J. L. RICE *vs.* FRANK P. GRAY and Others.

Upon hearing, the foregoing application of complainants for leave to amend their bill is allowed, and it is ordered that the bill so amended be filed and referred to E. N. Broyles, special master, heretofore appointed in this case.

May 19th, 1883.

W. B. WOODS,
U. S. Circuit Justice.

Filing.

Filed in clerk's office May 19th, 1883.

R. E. BOYD,
Deputy Clerk.

125 *Answer of F. P. and Cora M. Gray.*

In the Circuit Court of the United States for Northern District of Georgia.

J. L. RICE and His Wife, ADA S. RICE,

vs.

FRANK P. GRAY, CORA M. GRAY, *et al.*

Bill for account.

In answer to the specific charge in complainants' bill in regard to investments in mortgages on Oathcologa Mills, in Bartow county, Ga.—

These defendants say that Cora M. Gray received from her father's estate in cash the sum of nine thousand four hundred and twenty dollars and seventy-five cents, which was awarded *the* her by the commissioners appointed by the ordinary of Bartow county to make her equal to the advanced distributees of her father's estate. Said commissioners also awarded to her in land valued at $11,579.25; of this land Mrs. Cora M. Gray sold to Mrs. Mary L. Tumlin one hundred acres for four thousand one hundred and forty dollars in cash, and took the notes of Mrs. Mary L. Tumlin, who was
126 one of the heirs-at-law of Lewis Tumlin and perfectly solvent, for the sum of four thousand five hundred dollars as the balance of the purchase price. Mrs. Gray also sold to John S. Lake, of Bartow county, who was perfectly

solvent, land which came to her from her father's estate, to the amount and for the price of $3,100.00. Mrs. Gray also received from her father's estate a house and lot, in Cartersville, valued at $3,000. The said $9,420.75 received from the estate and $4,140 cash received from Mary L. Tumlin for part payment of the land makes $13,560.00, which forms the consideration of the $13,000 mortgage referred to in complainants' bill, leaving in Mrs. Gray's hands in cash $60, and Mrs. Cora M. Gray had still remaining in her hands in notes that were good, as follows:

$4,500 on Mary L. Tumlin;
$3,100 on John S. Leake,

$7,600, being the aggregate amount; and the said Frank P. Gray had received as commissions, as adm'r of Lewis Tumlin and for dividing the land, about $7,000.

And said Frank P. Gray, answering for himself, says that he never invested any sum whatever in Mississippi land in the
127 year 1877. He rented a farm in Mississippi in 1877 for the year 1878, and did run a cotton farm there in 1878.

And before the year 1879, when complainants charge that the $21,300 mortgage on Oathcologa Mills was bought with the money of the estate of Tumlin, A. J. Forestall, a cotton merchant in the city of New Orleans, had paid to said Frank P. Gray a large sum of money, to wit, $35,000, which is fully shown to be true by his, Forestall's, affidavit taken to be used in a case in equity filed by Lula T. Lyon *vs.* Frank P. Gray for injunction and receiver in Bartow superior court.

So these defendants both say they were fully able to purchase said mortgage on said mills for $21,300, if they so desired, without encroaching upon the funds of said estate in the hands of the administrator in any way whatever.

And defendant, Cora M. Gray, says that not a dollar of the money belonging to the estate, so far as she knows or believes, ever went into the purchase of either one of said mortgages, directly or indirectly.

And defendant, Frank P. Gray, says not a dollar of money
128 belonging to said estate ever did go into the purchase of said mortgages.

And said Frank P. Gray, answering for himself, says that he did buy a farm in the State of Mississippi on the 19th day of December, 1878, on a credit—not a dollar of money belonging to the estate was used in making said purchase or paying for said farm—to be paid for by installments, as follows: $3,000 on the 15th day of October, 1879, and the balance of the purchase price in four equal installments of $5,750 each, on the first days of January, 1880, 1881, 1882, & 1883.

FRANK P. GRAY.
CORA M. GRAY.

GEORGIA, *Fulton County:*

You, Frank P. Gray and Cora M. Gray, do swear that the facts stated in the foregoing answer are true so far as they relate to your own knowledge, and so far as they relate to information furnished by others you believe them to be true.

FRANK P. GRAY.
CORA M. GRAY.

Subscribed & sworn to before me this 31st day of August, 1882.

A. E. BUCK,
U. S. C. C. C.

129 *Filing.*

Filed August 31st, 1883.

A. E. BUCK, *Clerk.*

Answer of H. C. and J. G. B. Erwin.

JAMES S. RICE and ADA S. RICE
vs.
F. P. GRAY *et al.*
} In Equity.

Bill for relief, &c.

The joint and several answer of H. C. Erwin and J. G. B. Erwin, two of the defendants in said case, to the said bill of complaint.

These defendants, making the usual reservations, for answer, say that they are shown for the first time on this day the answer filed on behalf of the securities upon the administration bond of John A. Erwin and F. P. Gray on Oct. 3d, 1881, and were not aware of the contents of said answer until now, and because they never signed any other administration bond in said case except the bond of John A. Erwin, as hereinafter particularly stated, and were advised and believe that they were no longer liable as securities in said case on account of the discharge of and renunciation by said John A.
130 Erwin, as administrator on the estate of Lewis Tumlin, on the 12th day of June, 1876; they therefore gave the matter no more attention than they have done and have filed no answer previous to this time.

These defendants have not meant to disregard the process of the court or to lose any of their rights, but supposed they were merely nominal parties to said cause until within the last few days, when defendants learned that their names had been signed as secureties to the joint bond of F. P. Gray and John A. Erwin as administrators on the estate of Lewis Tumlin, and that it appeared in the separate powers of attorney given by these defendants separately to Henry C. Ramsour that these defendants' names were to be signed as secureties to the bond of said Erwin and Gray as administrators as aforesaid.

These defendants state the following as the facts in reference to the execution of the said powers of attorney, each for himself, setting out what happened:

Defendants were requested by said John A. Erwin to become securities on his bond as one of the administrators on the estate
131 of said Tumlin, but were not requested to become the securities of said Frank P. Gray as one of said administrators and would not under any circumstances have become surety for said Gray. Defendants agreed to become securities on the bond of John A. Erwin as such administrator and signed, each for himself, a power of attorney authorizing Henry C. Ramsour to sign their names to the bond of said John A. Erwin as one of the administrators on said estate, but the name of Frank P. Gray was not in either of said powers of attorney when defendants signed the same, and in the original powers of attorney the words "as one of the," after the name John A. Erwin, were stricken — after defendants signed said powers of attorney, and the character "&" and name "F. P. Gray" were inserted or interlined in lieu thereof, making it appear that defendants were authorizing said Ramsour to sign their names as securities on the bond of John A. Erwin and Frank P. Gray as administrators as aforesaid, while, in fact, defendants never gave any such authority and never agreed to become, and never, in fact,
132 became, the securities on the bond of said F. P. Gray as administrator as aforesaid.

These defendants believed and still believe and claim that the renunciation of said John A. Erwin of the administration of said estate under authority of law, as stated above and as set out in said general answer of all said securities, relieved them from all liability as securities of said Erwin, and not knowing the facts as to the said alterations in said powers of attorney, or as to their said Ramsour signing their names as securities to said joint bond of said Gray and Erwin, as said administrators, till recently, as stated, these defendants failed to file their answer before this, and pray that the defense herein set up may be considered and these defendants be permitted to make proof of said defense; that justice may be done them in the premises and they be discharged with their reasonable costs.

MYNATT & HOWELL,
Sol's for Def'ts.

You, H. C. Erwin and J. G. B. Erwin, do swear that the statements in the foregoing answer, so far as derived from your own knowledge, are true, and the statements derived from the in-
133 formation of others you believe to be true.

H. C. ERWIN.
J. G. B. ERWIN.

Sworn to and subscribed before me this 13th day of Sept., 1883.
[SEAL.]
J. H. JONES,
Notary Public, Fulton Co., Ga.

Filing.

Filed in clerk's office Sept. 13th, 1883.

R. E. BOYD, *Dep'y Clerk.*

Answer of H. C. Ramsauer.

Circuit Court of U. S. for the Northern District of Georgia.

RICE and WIFE *vs.* F. P. GRAY *et al.*

The separate answer of Henry C. Ramsauer to said bill.

This respondent, making the usual reservations, answering, says that he knows nothing about various charges in complainants' bill as to the waste and malfeasance in office of the said Frank P. Gray, administrator of Lewis Tumlin. He thinks he can safely say, however, that John A. Erwin committed no waste nor was guilty of any negligence or wrong during the short time that he remained
134 administrator. This respondent is the administrator of Luther R. Ramsauer, deceased; said Luther R. Ramsauer did not sign the bond of John A. Erwin and F. D. Gray, as administrators, but did sign a power of attorney authorizing this respondent to sign his name as one of the sureties to the bond of John A. Erwin as one of the administrators of Louis Tumlin, deceased, subsequent to the signing of this power of attorney by the said Luther R. Ramsauer, and while the said power of attorney was in the office of the ordinary of Bartow county, where it now appears recorded, the said power of attorney was changed by striking out the words "As one of the" and interlining the words "and F. P. Gray." Respondent is informed that this was done at the suggestion of the ordinary made to John A. Erwin, and that the said John A. Erwin did it upon the statement of the ordinary to him that there would be nothing improper in it. The said power of attorney of L. R. Ramsauer was signed at the same time and place that the power of attorney of H. C. Erwin and J. G. B. Erwin were signed; all of said powers of attorney made this respondent attorney-in-fact, and the same
135 interlineations and erasures appear in each one of them. Respondent has reason to know that it was the intention of all three of these persons to become the security of John A. Erwin only as administrator.

Respondent will further state that he has never supposed until very recently that there would be any attempt to hold those who signed as sureties of John A. Erwin responsible for the administration of the estate in any way after the discharge of John A. Erwin as administrator and the release of his sureties by the ordinary, and respondent is informed that according to the tenor of the bill originally filed in this case it was not the intention of the complainants or their counsel to hold John A. Erwin and those who signed the same bond with him liable for the waste, misconduct, and fraud charged in the bill.

The attempt so to charge the said Erwin and his sureties this respondent believes to be an after-thought on the part of the com-

plainants and is a surprise to this respondent; and respondent insists that if, under the pleadings in the cause, John A. Erwin and his sureties can be found liable in this case (which
136 this respondent does not believe), then respondent asks the court to consider his defenses. Respondent will concede that John A. Erwin and those on the bond with him are liable for the misdoings of John A. Erwin while he was administrator, but respondent is informed that, while John A. Erwin and his sureties are made parties to the bill filed in this cause, the said John A. Erwin is not definitely charged with any act of waste or wrong-doing. Furthermore, respondent is of opinion that he cannot be so charged truthfully.

And now, having fully answered all that this respondent is advised is necessary or material for him to answer, he prays to be hence discharged with his reasonable costs.

MYNATT & HOWELL,
Sol's for Ramsauer.

UNITED STATES OF AMERICA, *Northern District of Georgia:*

Personally came before me Henry C. Ramsauer, administrator of Luther R. Ramsauer, deceased, who, on oath, says that what
137 is stated in the foregoing answer of his own knowledge is true, and that which is stated on the information of others he believes to be true.

HENRY C. RAMSAUER,
Adm'r of Estate — Luther R. Ramsauer, Dec'd.

Sworn to & subscribed before me this 3d day of Oct., 1883.
J. C. BRITTAIN,
U. S. C. C. Com'r.

Filing.

Filed in clerk's office Oct. 4, 1883.

R. E. BOYD,
Dep'y Clerk.

Answer of J. M. Veach and Others.

In U. S. Circuit Court for the Northern District of Georgia.

RICE and WIFE *vs.* F. P GRAY *et al.*

Bill, etc.

The joint and several answer of W. J. Benham, R. L. Rogers, A. C. Trimble, A. W. Mitchell, J. M. Veach, and J. J. Howard to the bill of complaint filed in said cause.

These respondents, making the usual reservations, answering, say that they have not heretofore answered this bill because they were under the impression, from information as to the contents of said bill, that the complainants made no charges against nor asked

138 any relief from John A. Erwin and the sureties on the bond which he signed, and that these respondents were warranted in that conclusion is abundantly shown by an application on file in this case, and an order granted thereon to amend the bill so as to charge John A. Erwin and his sureties.

These respondents had no notice of that application and order, and have just now been informed of the same. They, perhaps, would not have been informed of it at all but for a rumor to the effect that the special master in this cause was going to report or had reported that said John A. Erwin and his sureties were liable jointly with F. P. Gray and his sureties for all the delinquencies of F. P. Gray after the resignation of the said John A. Erwin as administrator. These respondents had signed the bond made jointly by John A. Erwin and F. P. Gray as the administrators of the estate of Lewis Tumlin. John A. Erwin resigned his administratorship in May, 1876, and he, as well as his bondsmen, were discharged by order of the ordinary of Bartow county. These respondents supposed that was the end of their connection with the admin-

139 istration of said estate, and never supposed for a moment that any attempt would be made to hold them liable for any act of either Administrator Erwin or Gray after the discharge of said Erwin and of these respondents by the order of the ordinary in 1876. These respondents have not seen any amended bill filed in the cause, although the order to amend as above stated was taken; but, since the report of the master seems to cast a liability upon these respondents for the acts of F. P. Gray after the release of these respondents by the ordinary, and since the complainants have obtained an order to amend their bill stating the matters of amendment, these respondents deem it proper to file their answer.

Respondents insist that John A. Erwin is a necessary party to this bill as proposed to be amended; also that he is a necessary party to any action that may be had upon the report of the special master making him liable as well as his sureties for the acts of F. P. Gray after their release. John A. Erwin, as stated by the bill, is a citizen of Tennessee, the place of residence of the complainants in

140 this case, and was so at the time of the filing of the bill. Respondents are advised that if they, as sureties of John A. Erwin, are to be held liable it can only be in a proceeding in which John A. Erwin is a party, or under such state of the proceedings as would lawfully excuse his being made a party, which they are advised is not shown by the pleadings or proceedings in this cause; and respondents will further state that the report of the special master is entirely beyond the scope of the case, in so far as it seeks to visit liability upon the sureties of John A. Erwin after their release by the ordinary, and was a perfect surprise to these respondents, as it seems also to have been to complainants and their counsel, if respondents are to judge from the state of the pleadings.

These respondents will also state that they are informed that three of their co-sureties upon the bond of Gray and Erwin, to wit, H. C. Erwin, J. G. B. Erwin, and L. R. Ramsauer, respectively, signed powers of attorney authorizing H. C. Ramsauer, as attorney-in-fact,

to sign their names to the bond of John A. Erwin, as one of
141 the administrators of Lewis Tumlin, deceased, and that these powers of attorney were subsequently changed without the consent of the said Erwin and Ramsauer, so as to authorize their signatures to the bond of John A. Erwin and Frank P. Gray. Respondents have information that the said Erwin and Ramsauer are seeking release on the ground of said changes. Respondents insist that if the said H. C. Erwin, J. G. B. Erwin, and L. R. Ramsauer are not bonded with them on said bond that then these respondents are not bound. These respondents say that they were particular to make inquiry as to whether the Erwins and Ramsauer would go upon said bond, and they agreed to sign said bond only upon the condition that the others did. The bond was a very large one, and these respondents say that to sign the same was the assumption of a very grave responsibility. They were, therefore, particular to know who their co-sureties were.

Furthermore, these respondents state that they knew John A. Erwin well as an honest man, a man of fine business qualifications, and, reposing confidence in his high character as a business
142 man and a citizen, they were willing to sign the bond with him as administrator, but would not have signed said bond with Frank P. Gray as sole administrator, who was then comparatively a youth of little experience and by no means qualified to assume the sole administration of so vast an estate. These respondents will further state that on the 11th of April, 1876, John A. Erwin filed his application with the court of ordinary of Bartow county to be allowed to resign the administration. Of this application the heirs and distribute-s had notice. At the May term following of the said court of ordinary the application was granted and said Erwin's resignation accomplished as soon as he could settle with his successor. By the same order F. P. Gray was appointed sole administrator and required to give bond as such, and John A. Erwin and his sureties were discharged. These respondents never questioned the validity of the resignation of said Erwin or of the order discharging him and his sureties from further liability.

Indeed it seems to them that it would be very greatly out of the general order of things, as these respondents have always
143 understood them, if they should be held in an obligation they have not signed, they never having signed nor agreed to sign as sureties for Frank P. Gray as sole administrator for Louis Tumlin, deceased.

These respondents know nothing of the charges of misconduct, malfeasance, and fraud made by complainants against Frank P. Gray. They did not feel themselves interested in the matter, and did not deem it their business after the resignation of John A. Erwin. If they had had the least suspision that they were to be held liable in any way, or could by any possibility be held liable, they would have taken steps to disengage themselves as soon as John A. Erwin was released.

These respondents do not say this to the prejudice of Frank P. Gray or to cast suspicion upon him, but simply because they

did not desire to be his sureties in the administration of the estate, and in underwriting for John A. Erwin and Frank P. Gray they meant to vouch for John A. Erwin only. And now, having fully answered, these respondents pray to be hence dismissed with their reasonable costs.

T. W. MILNER,
MYNALT & HOWELL,
Solicitors for Respondents.

144 UNITED STATES OF AMERICA,
Northern District of Georgia:

Personally came before me William I. Benham, R. L. Rogers, A. C. Trimble, J. M. Veach, and J. J. Howard, who, on oath, say that what is stated in the foregoing answer as the act or deed of the respondents or either of them is true, and that which is stated as the act or deed of any other person they believe to be true.

J. M. VEACH.
W. I. BENHAM.
A. C. TRIMBLE.
J. J. HOWARD.
R. L. ROGERS.

Sworn to and subscribed before me this 8th day of October, 1883.
[SEAL.] AARON COLLINS,
U. S. C. C. Com'r.

A. W. MITCHELL.

Sworn to and subscribed to before me this 9th day of October, 1883, as to A. W. Mitchell.
[SEAL.] R. E. BOYD,
U. S. C. C. Com'r.

Filing.

Filed in clerk's office Oct. 9th, 1883.

A. E. BUCK, *Clerk.*

145 In the Circuit Court U. S. for the Northern District of Georgia.
September Term, 1881. In Equity.

JAMES L. RICE and ADA S. RICE
vs.
FRANK P. GRAY, Adm'r, *et al.*
No. 187.

Replication of James L. Rice and his wife, Ada S. Rice, to the answers of defendants, Frank P. Gray, Cora M. Gray, N. B. Tumlin, G. H. Tumlin, Mary L. Spencer, Lula T. Lyon, John S. Leake, Thomas W. Leake, John Neal, Thomas W. Akin, Miles G. Dobbins, James M. Veach, John W. Gray, A. C. Trimble, Joel H. Dyar, W. T. Wofford, J. C. Wofford, A. P. Wofford, W. W. Rich, E. M. Price, F. M. Ford, Nelson Gilbreath, J. G. B. Erwin, H. C. Erwin, H. C. Ramsour, adm'r of L. R. Ramsour; W. I. Benham, Robert L. Rogers, N. W. Mitchell, John J. Howard.

And come the complainants in the above-stated case, saving and reserving to themselves all and all manner of advantage of exception

to the manifold insufficiencies of the said answers of defendants, filed October 3, 1881, and to the answers this day filed and all of the answers of defendants filed up this date, or any of them, for replication thereto saith that complainants will aver and prove the
146 allegations in their bill and amendments thereto to be true, certain, and sufficient in law to be answered unto, and that the said answers of the said defendants is uncertain, untrue, and insufficient to be replied unto by these complainants, without this, that any other matter or thing whatever in said answers contained material or effectual in the law to be replied unto —; all of which matters and things these complainants are and will be ready to aver and prove as this honorable court shall direct, and humbly pray as in and by their said bill they have already prayed, and will ever pray, &c.

E. D. GRAHAM,
J. B. CONYERS,
W. K. MOORE, &
G. S. TUMLIN,
Solicitors for Complainants.

Filing.

Filed in office this 24th day of November, 1883.
A. E. BUCK, *Clerk.*

147 *Bill for Account, &c.*

In the Circuit Court United States for the Northern District of Ga.

JAMES L. RICE & WIFE

vs.

FRANK P. GRAY, Adm'r of L. Tumlin, Dec'd, & JAMES M. VEACH *et al.*, Securities on Administration Bonds, & JOHN NEAL, DOBBINS, *et al.*

In this cause, on sufficient cause shown to me, complainants are allowed to file their replication to the several answers of defendants heretofore filed in this cause on condition that the cause shall be speeded.
Nov. 24, 1883.

DON A. PARDEE, *Judge.*

Filing.

Filed in office November 24, 1883.

A. E. BUCK, *Clerk.*

148 *Report of E. N. Broyles, Special Master.*

In Circuit Court United States, Northern Dist. of Ga.

JAMES L. RICE & ADA S. RICE
vs.
FRANK P. GRAY, Adm'r of Lewis Tumlin, Dec'd, and Others.

Bill for relief, injunction, &c.

Report of Edwin N. Broyles, special master, in case above stated.

By virtue of the order of the court appointing me special master in said case I proceeded to hear evidence at various sittings at Cartersville, Bartow county, Geo., and at Atlanta, Georgia. At these sittings the parties and counsel were present. At most of them also a stenographer was employed who took down the evidence and afterwards furnished me copy of the oral evidence so taken down, and in some instances copy of brief written or documentary evidence. The evidence taken down by the stenographer accompanies this report in the form of books A, B, C, D, and E, paged, however, through all five of them.

At some of the sittings no stenographer could be had, but I made notes of all the evidence from first to last, which also accompanies this report.

Various documents were also put in evidence, which are
149 marked as exhibits and referred to in the proper place.

By consent of parties original papers pertaining to suits pending in Bartow superior court were used in evidence, and for convenience of parties and this honorable court temporarily accompany this report, but to be returned to Bartow superior court when needed.

Preliminary Facts Agreed upon or Not Disputed.

Heirs of Lewis Tumlin.

On June 2d, 1875, Lewis Tumlin, of Bartow county, State of Georgia, departed this life intestate.

He left as his heirs-at-law the following persons, to wit: Mary L. Tumlin, his widow, since married to H. G. Spencer, of Walton county, Geo.; his two sons, Napoleon B. Tumlin and George H. Tumlin, then a minor; his daughters, Mrs. Ada S. Rice, formerly Ada S. Tumlin; Mrs. Lula T. Lyon, formerly Lula Tumlin; Mrs. Cora M. Gray, formerly Cora M. Tumlin; Lewis T. Erwin, a minor son of a deceased daughter of Lewis Tumlin, whose interest in said estate has been duly transferred and assigned to def'd't, John S. Leake.

The widow in due time made her election to take a child's part instead of dower in said estate.

150 Each of said heirs are entitled to a one-seventh interest in the said estate. John A. Erwin, before the filing of the bill in this case, removed from the State of Georgia into the State of Tennessee, where he still resides.

At the death of Lewis Tumlin, Thomas Tumlin resided in Bartow county, Georgia, but has since removed to the State of Alabama, where he now resides.

Thomas Stokeley, one of the sureties on the adm'r bond given by Gray and Erwin, departed this life intestate before the filing of this bill, and no administration has been granted on his estate until within less than 12 mos. before filing this bill. Lewis R. Ramsaur, another surety on said Gray and Erwin's bond, departed this life before this bill was filed, and Henry C. Ramsauer has been duly appointed administrator on his estate.

Abda Johnson, another of the sureties of said Gray and Erwin's bond, departed this life July 10, 1881, and his estate had no representation when this bill was filed.

151 *Temporary Adm'rs.*

On June 11th, 1875, Frank P. Gray and Napoleon B. Tumlin were appointed by the proper court, to wit, the court of ordinary of Bartow county, temporary administrators on the estate of said intestate and gave bond in usual form, of same date, in the sum of $200,000.00, giving as sureties on their bond Abda Johnson, William T. Wofford, John W. Gray, James M. Veach, and Edwin M. Price.

Bond.

The condition of said bond was that said Frank P. Gray and N. B. Tumlin should carefully collect and preserve from waste or loss all the goods, chattels, and effects of the said Lewis Tumlin, deceased, and shall make or cause to be made a true and perfect inventory of all such estate, and the same being so preserved do surrender up such estate and effects, with the inventory aforesaid, unto the legal and proper administrators on or before the first Monday in August next (after date of said bond), or so soon thereafter as the ordinary shall direct, with all his other actings and doings therein, and faithfully perform the trust reposed in him. For copy of this bond see Exhibit A to Exhibit B of evidence taken in this case

152 *Gray and Irwin, Adm'rs.*

On 2d day of August, 1875, Frank P. Gray and John A. Erwin were duly appointed permanent administrators on said estate, and gave bond as such in the usual form in the penal sum of $600,000.00. The bond was joint and several, and payable to the ordinary of Bartow county, Georgia, for the time being, and his successors in office.

The condition of said bond, omitting formal parts, was as follows: That said administrators "do make a true and perfect inventory of all and singular the goods, chattles, and credits of the said deceased which have or shall have come to the hands, possession, or knowledge of the said Frank P. Gray and John A. Erwin, or in the hands or possession of any other person or persons for them, and the same so made do exhibit in the court of ordinary of said county when they shall be thereunto required, and such goods, chattles, and credits

do well and truly administer according to law, and make a just and true account of their actions and doings therein when required by the superior court or the ordinary for the said county; and all the rest of the goods, chattles, and credits which shall be found
153 remaining upon the account of said administration, the same being first allowed by the said court, shall deliver and pay to such persons, respectively, as are entitled to the same by law."

The sureties on said bond are William T. Wofford, Abda Johnson, W. W. Rich, John W. Gray, James M. Veach, Noah King, A. C. Trimble, Edwin M. Price, Joel H. Dyer, John S. Leek, Nelson Gilreath, J. C. Wofford, J. J. Howard, A. W. Mitchell, Thomas Stakeley, Robert L. Rogers, L. A. Ramsauer, J. G. B. Erwin, H. C. Erwin, N. J. Benham, and Thomas Tumlin.

For copy of this bond see Exhibit B to Exhibit B of evidence in this case.

Inventory.

4. On the 24th day of September, 1875, said administrators returned into the court of ordinary of Bartow county an inventory and appraisement of said estate, but it did not purport to be a full account of all said estate, as it alleged there were some wild lands and evidences of debts left out to be appraised as soon as they could be definately ascertained.

This inventory was recorded by the ordinary Nov. 4, 1875. See Exhibit C in this case, pages 1 to 14.

By reference to said exhibit it will be seen that it embraced
154 lands in Floyd county, Georgia, and in Cherokee county, State of Ala., as well as the lands in Bartow county, Geo.

Sale of Personal Property.

5. On the 8th and 9th days of September, A. D. 1875, the administrators duly sold certain personal property of the estate, amounting in the aggregate to $6,589.00. See Exhibit C aforesaid, pages 33 to 38.

Second Sale of Personal Property.

On Dec. 8th, 1875, another sale of personal property was made, aggregating $2,333.73. See said Exhibit C, page- 39 & 40.

Returns of both these sales were made to the ordinary by the administrators May 22, 1876.

Year's Support for Widow and Minor.

6. On August 14th, 1875, a year's support for the widow of deceased, Mrs. M. S. Tumlin, and a minor child, G. H. Tumlin, was duly set apart by appraisers; in amount, $3,322.80.

This report was filed in said ordinary's office on August 24, 1875. On March 6, 1876, this report was allowed by said ordinary and recorded. See said Exhibit C, pp. 40 & 41.

Commissioners to Divide Land.

7. At a regular term of the court said ordinary, on Sept. 6, 1875, passed an order appointing certain freeholders, to wit,
155 John J. Howard, Nelson Gilreath, W. W. Rich, Seaborn Dishroon, and J. S. Leake, commissioners to make distribution of the lands belonging to said estate in Bartow county among the distributees of said estate, to wit: Mary L. Tumlin, widow of deceased, she having duly elected to take a child's part in lieu of dower; Napoleon B. Tumlin, Ada S. Rice, Lula T. Lyon, George H. Tumlin, Cora Gray, children of deceased, and Lewis T. Erwin, grandson of deceased; said order recites that three of said distributees, to wit, Napoleon Tumlin, Ada S. Rice, and Lula T. Tumlin had made application to said ordinary for said order. The order recites that some of said distributees had been advanced — by deceased in his lifetime. The order then directs the commissioners to make distribution of the lands belonging to said estate among said distributees according to law, first making the unadvanced or less advanced up with those advanced out of lands and city property detached from the plantation on which deceased resided at the time of his death and then dividing said plantation amongst all the distributees.

156 *Return of Commissioners.*

On October 11th, 1875, commissioners made return showing distribution as directed; said return was recorded Nov. 5, 1875. See said Exhibit C, pp. 15 to 22, and Exhibit R.

Supplemental Return.

Afterwards—no date given—said commissioners made supplemental report in relation to Mrs. Cora Gray's share.

By the first return Mrs. Gray was charged with and allowed two items, among others, as follows:

To advancement by adm'rs	$1,764 93
By cash	7,655 82
	9,420 75

By the supplemental return Mrs. Gray is allowed $942.75 in cash. See said Exhibit C, pp. 20 and 22. This supplement was recorded Feb. 22, 1876.

Application by Adm'rs for 3 % Commission on Division of Land.

On the first day of May, 1876, said Gray and Erwin, as adm'rs aforesaid, made application in writing to said ordinary, asking that they be allowed 3 per cent. on $114,456.00 as commissions and compensation for their services in and about the division in kind of said real estate as before stated. The petition, not sworn to, alleges that
157 the responsibility and trouble in effecting said transfer has been considerable. The petition contains no prayer for process or rule calling on the heirs to show cause, and does not appear but that it was an entirely *ex parte* proceeding.

3 Per Cent. Allowed.

The ordinary grants the prayer at May term, 1876. See Exhibit M.

Gray and Erwin's Return.

On May 22d, 1876, said adm'rs, Gray and Erwin, make their first annual return. This is also return of the acts and doings of the temporary administrators. It covers time from June 11, 1875, to May 6, 1876. See Exhibit D.

This return was examined and allowed by said ordinary and made judgement of the court, it is so stated, June 26, 1876, and recorded July 1, 1876. This Exhibit D does not, as it should, give item of $1,000 on credit side June 22, 1875—N. Tumlin's note.

This Exhibit D purports to be a full copy of the original return, but it lacks that $1,000 item, on the credit side, of being a full copy.

Erwin Applies for Discharge.

On April 11, 1876, John A. Erwin, one of said adm'rs, filed his petition in said court of ordinary, seeking permission to resign
158 his office as such adm'r on the ground that his health was so bad he could not properly attend to the duties of the office The petition alleges that most of the real estate and a great portion of the personalty of said estate had been divided and delivered to the *the* distributees; that Gray, the other adm'r, is willing to give new bond and carry on the administration alone. The petition gives the names and residences of each distributee; shows that said Erwin was the guardian of two of them, to wit, George Henry Tumlin and Lewis T. Erwin; prays that all the distributees be cited to appear and show cause.

On same day, April 11, 1876, the ordinary issues the order requiring the various distributees to show cause at May term, 1876, of said court.

All the parties were duly served, or acknowledged or waived service, said John A. Erwin acknowledging service for his said wards.

F. P. Gray, on May 1st, 1876, put in writing his willingness for said Erwin to resign and he, Gray, to retain the sole administration in his own hands, and offering to give such bond as the ordinary should require.

Erwin's Discharge.

At May term, 1876, of said court, the order allowing Erwin
159 to resign is granted. The order, among others, cites the following: That all the heirs have been duly served with citation to show cause why Erwin should not be allowed to resign, etc., and all of said heirs being represented now before the court and no sufficient cause being shown to the contrary, and it appearing to the court that the bodily health, physical infirmities, of said Erwin and the health of his wife are such that he is unable to attend to said

duties, that said Gray is willing to act as sole adm'r, he being also served and appearing, and that such resignation will not injure the estate in any way.

Gray Sole Adm'r.

By same order F. P. Gray is appointed sole adm'r and is required to give a new bond and security in sum of $140,000. When said bond is given and Erwin settles with Gray as to the administration and files Gray's receipt as successor in the ordinary's office, then said Erwin and his secureties be discharged from all liability for any mismanagement of said estate in the future, but not for any past liability of said Erwin as administrator.

160 Erwin's petition for discharge says nothing about discharging his sureties.

See, as to this, item 12, Exhibit N.

Gray Gives New Bond.

13. On May 2, 1876, Gray gave new bond in sum of $140,000, conditioned, substantially, as the bond described in item 3 of this report. The sureties to Gray's bond were Abda Johnson, Wm. T. Wofford, Edwin M. Price, Noah King, W. W. Rich, J. W. Gray, J. C. Wofford, John S. Leake, Thomas W. Leake, and Nelson Gilreath.

See Exhibit C to Exhibit B of this report.

Gray Gives Erwin Final Receipt.

14. On the 6th of May, 1876, F. P. Gray gave to J. A. Erwin a receipt for all the property of the estate which had been in Erwin's possession as co-administrator.

A list or schedule of the property is given and is declared to be all the property belonging to said estate at that time unadministered, so far as known by said Gray, except some wild lands. Said Erwin filed said receipt in the ordinary's office May 22, 1876.

See Exhibit O to this report.

Erwin Discharged.

15. On June 12, 1876, at an adjourned term, the order of final discharge of said Erwin is passed. See Exhibit N above.

161 *Appeal to Superior Court of Bartow Co.*

16. The decision of the court of ordinary permitting said Erwin to resign and Gray to become sole administrator was appealed from and case carried to sup'r court of Bartow county, and there, on August 4, 1876, affirmed by verdict of a jury. There is no record evidence that a judgment was entered upon said verdict. The decision appealed from was, as before shown, made May 1st, 1876, and the appeal must have been sued out or entered within 4 days from the adjourned of said May term, not counting Sundays or holidays. See Exhibit " P " to this report, Code, 3613, 3614.

Gray gives Bond to Erwin.

17. On June 16th, 1876, F. P. Gray gave the bond to said John A. Erwin in the sum of $40,000, with his sureties, D. W. K. Peacock, John W. Gray, Edwin M. Price, and John S. Leake, reciting, among things, that said Erwin has and does by said presents transfer, assign, turn over, and deliver to said F. P. Gray all the commissions and compensation that had been or might be allowed by the ordinary or the law of the State to said Erwin for his services as adm'r of said estate, and then, in consideration thereof, said F. P.
162 Gray bound himself, his heirs, etc., to pay and satisfy any judgment or decree or order that might be made, rendered, or pronounced by any court of law or equity, and all expense or costs necessarily incurred in defense of any suit against the said John A. Erwin for any waste, loss, or damage, or injury caused or occasioned by any act or failure of duty in any way whatever by the said John A. Erwin, administrator of said estate, to any heir-at-law or creditor of said Lewis Tumlin. By said bond said Gray obligated himself to protect and save harmless in like degree the sureties of said Erwin on said Erwin's administration bond. See Exhibit "Q" to this report.

3d Sale of Personal Property.

18. On June 10th, 1876, F. P. Gray, as adm'r., sold personal property aggregating $616.11, and made return thereof to court of ordinary Aug. 6th, 1877.

Tumlin Mills Sold to Ford.

19. On June 6th, 1876, Gray, adm'r, had property known as Tumlin Mills, on Etowah river, consisting of 1¾ acres of land, mill-house, three setts of mills, and other necessary machinery, and dwelling-house on said lands, sold to F. M. Ford for $1,300, terms of sale being ⅛ cash and balance in three equal installments of 6, 12,
163 and 18 months. The adm'r made return of said sale to the court of Ordinary Sept. 14, 1877. See item 28, past.

Wofford and Wofford and Rich, Sureties on Bond, Applies for and Obtains Discharged.

20. On March 23d, 1877, Wm. T. Wofford, Noah King, Edwin M. Price, W. W. Rich, and James C. Wofford, part of the sureties on F. P. Gray's administration bond described in item 13 of this report, filed a petition in said court of ordinary praying to be relieved as sureties on said bond. In this petition seventeen separate grounds or reasons are set out and assigned as a basis of relief.

The petition closes with prayer that Gay be notified to appear at said court on 1st Tuesday in April, 1877, and show cause why they should not be released. On same day the rule is passed, directed to said Gray, and it is served on him the same day. In answer to this rule Gray, whilst denying the truth of the various charges preferred against him in said petition, admits the right of applicants to be discharged and consents to it.

On Oct. 1st, 1877, at a regular term of said court, said sureties withdrew all the charges made against Gray in said petition
164 and insisted they had a right to their discharge, as sureties on said bond, from all further liability on said bond.

At same Oct. term, 1877, the court of ordinary granted the order discharging said sureties, W. T. Wofford, James C. Wofford, and Wm. W. Rich, as prayed for, to take effect on said Gray's giving a new bond in sum of $140,090.00 by Oct. 20th, 1877. See Exhibit T.

On Oct. 13th, 1877, Gray gave a new bond, as required by said order, with the following persons as sureties, to wit: Nelson Gilreath, A. P. Wofford, Thomas Tumlin, Abda Johnson, Noah King, F. M. Ford, John S. Leake, Thomas W. Leake, and John W. Gray. See page- No-. 20, 21, 22, Exhibit B.

Another Bond.

21. On May 6th, 1878, Gray gave another bond, in sum of $140,000, with same sureties as last bond, except Noah King and Thomas Tumlin. This bond caused by Noah King's applying for and obtaining discharge. See pp. 22 & 23, Exhibit B.

Second Return.

22. Aug. 6, 1877, Gray, adm'r made return to July 1st, 1877. See Exhibit E.

Time to Make Return.

23. On July 2d, 1877, on application by Gray, adm'r, to the court of ordinary, he was granted until 1st Monday in August to
165 make returns for 1876, and that he be saved from forfeiture of commissions on same. See Exhibit- S and T.

Return of 1878.

24. Sept. 2, 1878, Gray, adm'r, made return for year ending July, 1, 1878. Exhibit F.

Time Given to Make Return.

25. At July term, 1879, Gray, adm'r, obtained order from said court ordinary giving him till 1st Monday in Sept. to make return and save forfeiture of commissions on same. Exhibit U.

Return for 1879.

26. On Sept. 1, 1879, Gray, adm'r, filed his return for year ending July 1, 1879. Exhibit G.

Return for 1880.

27. July 5, 1880, Gray, adm'r, made return for year ending July 1, 1880. Exhibit H.

Time Given to Make Return.

28. On application of Gray, adm'r, the ordinary of Bartow county, July 4, 1881, granted Gray until 1st Monday in August to make return for year ending July 1, 1881, and to prevent forfeiture of commissions & so —, Sept. 5, 1881. Exhibits V, W, X.

166 *Return for* 1881.

29. Sept. 10, 1881, Gray, adm'r, made return for year ending July 1st, 1881. Exhibit I. Said return examined, allowed, and ordered of record by said ordinary Oct. 8th, 1881.

Neel Made Receiver.

30. On Nov. 14, 1881, James M. Neel was appointed receiver in this case of all the property and effects, rights and credits, belonging or appertaining to the estate of Lewis Tumlin, deceased, not then administered.

31. Exhibit J is an inventory filed by said receiver of the unadministered realty of said estate, & Exhibit K of the personal property of said estate which has come into the hands of said receiver.

N. B. Tumlin, Temporary Adm'r.

32. N. B. Tumlin, one of the temporary administrators, made no report himself, neither did he unite with Gray and Erwin in making report. Said N. B. Tumlin received no compensation or commissions for his services as such administrator. His connection therewith seems to have been only nominal or formal. No charges of waste or neglect of duty are made against him, and no relief prayed against him. (See evidence, p. 81, & N. B. Tumlin's answer.)

167 *Returns— When Made.*

33. The bill charges that the administrator, Gray, failed to make his returns in the time required by law, and insists that he has thereby forfeited all right to have commissions allowed him on the same.

By reference to items 23 to 29, inclusive, of this report, it will be seen that the ordinary gave the administrator further time to make returns in each year, except for year ending July 1, 1878. By reason of these orders from the court of ordinary the adm'r is relieved from such forfeiture for each year, except that ending July 1, 1878. Code of Ga., 2596. Failure to make returns forfeits commissions, but a delay of one or two months may not have that effect, and in this case I allow the adm'r his commissions on said return. Code, 2525–2596.

Return for 1878.

34. Item 24 of this report shows the return which should have been made — July term of the court of ordinary was made Sept.

2d, 1878. It does not appear that any order was passed relieving the adm'r from forfeiture of commissions for that year, but see item 33.

168 *Commissions on Interest Collected.*

35. The evidence shows that the administrators, Gray and Erwin and Gray, in their returns claimed ten per cent. commissions on all sums of interest collected, whether accruing on debts created by loans of money by the intestate or by the administrators or on other debts founded on sale of real or personal property or otherwise. This claim was approved and allowed by the court of ordinary. The law of the State entitles adm'rs to the ten per cent. commissions on interest collected on loaned money only, and not on other debts. Code, 2590.

On what Interest are Commissions Allowed.

36. The evidence shows that Lewis Tumlin, the intestate, was a trader in lands and other property and a money-lender, and that some of the debts due or to become due to his estate were for loaned money and some for property sold. Some bore interest at one rate and some at another—at different rates. Now, the inventory of the goods and chattles, lands, and tenements, etc., does not specify which debts due the estate were for loaned money and which for sale of property; neither do any of the returns made show this;
169 neither does said inventory, in giving a schedule or list of the debts due said estate, specify the rate of interest said debts bear; neither is this shown by said returns; neither have the parties been able to show by evidence in many, perhaps most, instances what was the consideration of the claims due the estate, nor the rate of interest the claims respectively bore. Here arises the question: As the administrators are not entitled to the ten per cent. on all the interest collected, on what part are they entitled to said commission? On all shown to be collected on loaned money only, or on all not shown to be based on some other consideration? In other words, on whom is the burden to discriminate? Must the administrator show his right to the commission, or must his opponent disapprove it? It is certainly the duty of the administrator to so show his right, and hence he cannot receive the ten per cent. commissions on any interest collected, except on the interest collected for money loaned as shown by evidence.

10 % *Additional for Interest Collected.*

37. It has been a mooted question in this case whether the adm'r, when he collected interest for loaned money, has the right to
170 the 2½ % commissions allowed generally for receiving the money, whether principal or interest or both, and ten per cent. additional as special commission on interest. A fair and reasonable construction of the law, Code, 2589 and 2590, makes this distinction: Where the adm'r himself lends money and collects it

back and interest he is entitled to ten per cent. only on the interest made; but if he collects a debt, principal and interest, created by the intestate he is entitled to 2½% on the whole debt collected, principal and interest, as the general commission, and an additional 10% on the interest collected.

Wild Lands.

38. Complaint is made that no inventory of the wild or uncultivated lands of the estate has ever been made and returned to the proper court. This is true. The evidence shows that the title papers to said land were difficult, if not impossible, to obtain in many cases, and that it was next to impossible to make a complete and accurrate inventory of these lands. An imperfect list, but perhaps the best that could be obtained, was made out by the adm'r and turned over to the receiver in this case. No return of this list was made to
171 the court of ordinary. Such ought to have been done, accompanied by proper explainations. The failure to do this, though a failure of a legal duty, is not shown to have damaged the estate. The evidence shows considerable diligence by the adm'r in trying to get up list of the wild lands. Code, 2516 to 2523; Ev., 91 to 93, 145 & 146, 224–243.

Erwin's Discharge. Discharge of Sureties on Gray and Erwin's Bond.

29. Under the facts shown in the items 12, 13, 14, 15, and 16 of this report complainants insist that Erwin's effort to resign and get discharged was ineffectual, and that he never was discharged in law. This view is not correct. There was a valid resignation and discharge of Erwin from office of administrator dating from June 12, 1876. Code, 2610–3628; Ev., 240, 303, 364, 376, 413, 441. This being so, what effect did Erwin's resignation and Gray's becoming sole administrator and giving a new bond have upon the sureties of Gray and Erwin's bond, given, as shown, in item No. 3 of this report. Said sureties, in their answer to the bill in this case, insist that the proceedings for the discharge of Erwin and his discharge also released the sureties on the bond from liability for the future conduct of Gray, they, of course, remaining liable for past misconduct of either
172 Gray or Erwin; but complainants insist that Erwin's discharge under the facts, if it had any effect, was only to release him as administrator; that Gray became sole administrator under the old bond, and that the new bond was not a substitute, but only an additional bond. The following sections of the Code bear perhaps on the question: 2514, 1817, 2509, 2510, 2512.

Sureties on Bond of Gray and Erwin Not Discharged.

40. The evidence shows that Erwin did not apply to the court of ordinary for a discharge of the sureties, and that no such application was made on their behalf. Erwin applied for his own discharge as adm'r and not as surety to Gray; hence there was not and could not have been any binding order or judgment of discharge of any

of the said sureties under the pleadings unless the discharge of Erwin, as adm'r, as matter of law discharged the sureties. Did it have that effect or not?

The evidence shows that on Erwin's discharge as adm'r Gray was not reappointed to the office of adm'r and took the estate as administrator *de bonis non*, but he continued in office; his was not a new administration, but the trust continued in him. Items 12 to 16, Ev., p. 388.

173 It is some act of the creditor and not the act of the law which discharges a surety. Code, 2152, 2154, 2862.

In this case Erwin's discharge as adm'r was the act of the law and not the act of the creditors or parties at interest. The ordinary was not the real party at interest, but only the nominal party, the heirs and creditors of Tumlin's estate being the real parties; hence I conclude that Erwin's discharge did not have the effect to discharge the sureties on the bond given by Gray and Erwin.

3 % Commissions on Divisions of Land.

41. Complainants insist that 3 % allowed by the ordinary to Gray and Erwin on division of land as shown in item 10, thus giving them the sum of $3,433.68, is excessive and ought not to be paid. The adm'rs and sureties contend that sum is not excessive, and if it was that the action of the ordinary is binding and conclusive upon the heirs and this court. A great deal of evidence was introduced on the question of excessiveness or not. Ev., pp. 64, 67, 75, 76, 77, 78, 307, 308, 312, 313, 366, 367, 326, 327, 259, 260, 278, 281, 331, 332, 287, 343, 344, 347, 48, 349, 50, 51, 359, 368, 369, 395, 396, 397, 405 to 407, 410, 411.

174 *$500 for Dividing the Land.*

Under all the evidence and under the law 3 per cent. is excessive and $500 is all owed the administrators for their services in dividing said lands. The decision of the ordinary allowing said 3 per cent. is not conclusive of the matter, as the proceeding was *ex parte* only. Code, 2594.

The return of the administrator, even when allowed and approved by the ordinary and recorded, are only *prima facia* true and correct in his favor and against him. Hence evidence is admissible to show errors in the same, whether of omission or commission, to show the administrator chargeable for items not contained in his return, and to show he is not entitled to credits which he in his returns claims and have been allowed as correct by a general approval of the return by the ordinary. Code, 2527.

Complaints against the Returns.

41. The bill alleges that the administrator in many instances claimed and obtained credit in their returns to which they were not entitled, and that they have failed in many instances to charge themselves when they ought to have been charged. These com-

plaints are chiefly against the adm'r, Gray. Since Erwin's
175–187 discharge much evidence was introduced on both sides on these charges, most of which was taken down and copied off and goes along with this report. The special master made notes of all the evidence introduced on these and other points, which also accompany this report. These several points will be specially considered when the returns of the adm'r are taken up.

Last Return.

The evidence shows that the adm'r, Gray, in several instances failed to make return of collections made by him in the proper or next return made after such collections, but embraced them in some subsequent return. The evidence shows also that the last return made after the bill in this case was filed accounted for or answered several of the objections or complaints of this character in the bill.

* * * * * * *

188 *The Augier Fi. Fa. vs. Gray, Adm'r.*

56. The bill charges that on June 21, 1879, said claim amounted to $15,607.91; that on that day Gray, adm'r, took the receipt of the att'y of pl'ff in said *fi. fa.* in full of principal and interest and costs of same, and in his annual return for 1879 took credit for the same and returned said receipt for voucher; that Gray did not have said *fi. fa.* entered satisfied, but caused the same to be delivered to said Neal as an open *fi. fa.* against said estate, and soon after transferred to said Neal notes belonging to said estate, well secured by mortgages on R. M. and P. M. B. Young, for over $6,000. This was done, says the bill, to secure a loan by said Neal to *say* Gray for largely over $7,100.00, upon which Gray was to pay said Neal
189 usurious interest at one per cent. a month.

Neal's att'y now holds said *fi. fa.* notes and mortgage for collection, and when collected to be applied to pay the residue of said Neal *fi. fa.* Bill prays that the Neal or Augier *fi. fa.* be entered satisfied, and said notes and mortgages surrendered. The following are the facts in relation to said Augier *fi. fa.:* On April 1st, 1879, said *fi. fa.* issued against Gray, adm'r, as prin., and Richard C. Roberts, surety on supersidias bond, for $82.30 principal debt, and $6,588.44 for interest to Jan'y 15, 1878.

On April 2d, 1879, sheriff of Bartow county levied said *fi. fa.* on various parcels of real estate belonging to said estate. On same day Gray, adm'r, paid on said *fi. fa.* $3,000 to F. W. Aiken, pl'ff's att'y. On June 21, 1879, F. W. Aiken, pl'ff's att'y, receipted on said *fi. fa.* from Gray, adm'r, all of costs due thereon and of the principal and interest due thereon, except the sum of $7,100.00. On same day, June 1st, 1879, said att'y transferred, by written endorsement, said *fi. fa.* to John Neal. After this transfer, to wit, Dec. 28, 1880, ev., 482, said F. W. Aiken becomes Neal's att'y to collect said *fi. fa.*

190 On April 4th, 1879, said Aiken, as Augier's att'y, gave John Neal receipt for $5,000, to go on said *fi. fa.*, with promise in writing to transfer said *fi. fa.* to Neal to am't of $5,000, when Gray, adm'r, should pay off the residue of it.

On same date Gray, adm'r, certifies in writing that Neal had paid $5,000 on said *fi. fa.*, and agrees it shall bear 7 % interest until repaid in full to him (Neal). On June 20th, 1879. said Neal paid to said Aiken, att'y, $2,100.00 on said *fi. fa.* on same terms as the $5,000 was paid.

On May 22d, 1879, Gray, adm'r, paid on said *fi. fa.* to said Aiken, att'y, $1,900.

On March 26, 1881, said Aiken, as att'y for Neal, receipts Gray individually, and not as adm'r, for $1,290.41, expressed to be all interest due said Neal to M'ch 1st, 1881. on the $7,100. Neal had advanced of this $1,290.41; the sum of $373.48 was the extra interest or interest over and above 7 per cent. On June 21, 1879, said Aiken, att'y, gave receipt, of which the following is a copy, omitting the caption stating the case.

Voucher 38, $15,607.91.

"Rec'd on the above-stated *fi. fa.* fifteen thousand six hundred and seven dollars and ninety-one cents ($15,607.91) in full of
191 principal, interest, and costs due on the above-stated *fi. fa.* June 21, 1879.

THOS. WARREN AIKEN,
Pl'ff's Att'y."

Notes on Young and Young.

In his annual return to the court of ordinary, Gray, adm'r, returns said receipt as voucher No. 38 and takes credit for the said sum of $15,607.91.

Gray, adm'r, on March 4, 1881, enters into a written contract or statement to Aiken and Aiken to effect that he, Gray, then put into their hands as collateral security for said Augier *fi. fa.* these notes on P. M. B. and R. M. Young, dated Dec. 1, 1879, bearing interest at 10 % from maturity, notes for $1,667.25, $1,942.30, and $2,118.86, due at 2, 1, and 2 years; also another note and mortgage on said Young; two notes on N. S. Eaves, one for $318.51 and the other for $318.51, both bearing interest at 8 %—Aiken and Aiken to collect said notes, retain their fees, and apply the residue to balance due on said *fi. fa.*

$7,100 *from Neal.*

Gray contended that he individually borrowed said $7,100 from Neal and paid it to Aiken, Augier's att'y, in satisfaction of said *fi. fa.*; that he owes same to Neal and will pay him, and that Neal has no claim against the Tumlin estate, and he, Gray, having thus
192 extinguished by payment said *fi. fa.* entirely, is entitled to credit in his returns for said sum of $15,607.91.

On the contrary, Mr. Neal insists that he did not lend the money to Gray, but advanced it to Aiken as Augier's att'y, with the under-

standing that he was to have the control of said *fi. fa.* against Tumlin's estate, though he relied on Gray's promise to pay him the extra interest.

In regard to the receipt given by Aiken, June 21, 1879, for $15,607.91, Mr. Aiken says it was not intended as evidence that Gray had paid the money, but only that Augier had been paid; that it was understood at the time it was given, between him and Gray, that said receipt was not to be used as a voucher.

Augier Fi. Fa.

Gray denies this and says that the very purpose he had in view was to use it as a voucher. Much evidence was introduced on this matter. See Ev. pp.:

Gray, F. P., 120 to 122, 180–189, 519 to 523, 820 to 827, 856, 857, 917 to 924, 952, 96.
Aiken, T. W., 476 to 500, 502–504, 543–547, 551, 757 to 768, 948–951, 955–961.
Neal, John. 504 to 510, 547, 548, 956.
Leake, J. S., 511 to 517.
Tumlin, Henry, 517.
Tumlin, N. B., 518.

193 Aiken, John W., 535 to 542.

The evidence shows that Neal took no note from Gray for the $5,000 or $2,100, but Gray perhaps gave Neal due-bill for $187.50, June 20, 1879, for some extra interest.

In advancing the $5,000 Neal drew a bank check payable to T. Warren Aiken or bearer, dated April 4, 1879, and so as to the $2,100 the evidence is very conflicting, but shows clearly that Neal did not lend the money to Gray individually, but advanced it on the faith he was to have control of the *fi. fa.* against the Tumlin estate for reimbursing him. The $7,100, with seven per cent. interest and said *fi. fa.* in Neal's hands, is now a valid and subsisting claim against the estate of Lewis Tumlin to the amount of $7,060.48, with interest thereon at rate of seven per cent from March 26, 1881.

Augier Fi. Fa. Still Open for $7,060.48, *with Interest from March* 26, 1881.

57. It follows also that Gray, adm'r, is not entitled to credit for the full amount of said *fi. fa.*, but for only such sum as he has paid on it in reduction of the estate's indebtedness thereon—that is, to June 21, 1879. Gray, as adm'r, had paid on said *fi. fa.*, in the aggregate, the sum of $8,607.91, and afterwards, on 26th March,

194–197 1881, he paid on principal and legal interest of said *fi. fa.* $916.93. On March 26, 1881, the principal and legal interest due on said *fi. fa.* was $7,977.41, from which said sum of $916.93 being taken left $7,060.48, and this sum, with legal interest thereon since March 26, 1881, is due on said *fi. fa.*

Voucher 38 *in Return of* 1879 *Good for* $8,507.91.

58. Mr. Gray, adm'r, instead of voucher 38, in his return of 1879, it being for said sum of $15,607.91, is entitled to credit of that date

and in place of said voucher to amount $8,507.91, and on M'ch 26, 1881, to another credit of $916.93 for payment made that day as above stated.

* * * * * * *

$500 *Fee to Jno. W. Wofford.*

63. Voucher 49 in return of 1877; John W. Wofford's $500
198 fee. Complainant's object to that item and pray that Gray, adm'r, is not entitled to credit for the same, because at time said payment was made to said Wofford he was largely indebted to Tumlin's estate and Wofford — insolvent, and that much and more will be lost to the estate; that such payment under the circumstances was waste by the adm'r. The evidence shows that at Lewis Tumlin's death said Wofford was largely indebted to Tumlin's estate on notes and acc'ts; that said Wofford had been Tumlin's lawyer in much of his litigation; that said Wofford, being pecuniarily embarrassed, refused to work for the adm'r of Tumlin's estate in any new business or new cases and let his fees go toward paying what he owed Tumlin's estate, and insisted on payment in money from the adm'r for any such services rendered for him.

Owing to said Wofford's familiarity with the business of the estate, the adm'r felt he could not well get along without services of said Wofford, and thought it best to employ him even on said terms and did so and paid him said $500. These facts justify this action of the adm'r and he is, therefore, entitled, as he has charged, to credit for said $500.

199–208 *Division of Fees between Adm'r and his Att'ys.*

64. The bill charges that Gray paid out large sums as att'y's fees, and that he, Gray, was to divide such fees and get a part of the same; that this was illegal; that he, Gray, as adm'r, is entitled to credit for only such sums as he actually paid out to att'ys and only for services necessary to be rendered. The evidence shows that of the fees paid by Gray, adm'r, he received back the sum of $289 to himself. This he cannot retain and is liable to the estate for it. With certain exceptions, hereafter specifically noticed, the fees paid out by the adm'r are shown by the evidence to be proper charges against the estate, and for which the adm'rs are entitled to be credited. Code, 2543.

* * * * * * *

209 *Returns.*

1st Return by Gray and Erwin.

79. Said return as made shows a balance in cash in hands of adm'rs of $2,616.20. Under the evidence I reach a different result, caused by the rejection or modification of some items claimed on the credit side in said return and by charging items against the adm'rs not included in said return, all of which are as follows:

Items chargeable against said adm'rs in said 1st return which are

not charged therein—three credits on note of W. W. Tumlin for $2,200—said credits are as follows:

Dec. 21st, 1875	$240 00
This by note taken from W. W. Tumlin on Mrs. Lula T. Lyon Feb'y 25, 1876	100 00
March 20, 1876	100 00
210 Balance on S. D. McGregor note, prin. and int., to May 6, 1876	42 11

The following are items of credit disallowed or modified or reduced in this report, which were allowed in said return, to wit:

1. Note on Gilreath and Son. (This disallowed as insolvent)	$750 00
2. Note on Thos. Tumlin; no security taken from him and it is worthless. (Ev. 898 to 900)	171 28
3. Voucher 64 in said return is for $7,550, but is by mistake put down as $7,750	200 00

This report allows the following commissions instead of those claimed and allowed in said return:

On collecting $1,592.97, interest, 10%	$157 29
Com's 6⅔ pr. ct. on $3,183.57, proceeds of growing crops for year 1875	212 22
Com's at 2½ pr. ct. on $33,836.62, received	845 91
" " " " paying out $25,241.44	631 03
Extra compensation for division of land in kind of the estimate value of $114,456	500 00
	$2,346 45

211–219 The commissions claimed and allowed in said 1st return are as follows:

Com's on paying out $26,449.22, 2½%	$661 23
" " receiving $34,678.00, 2½%	866 72
" " interest made, $1,883.17, 10%	181 31
" " growing crops, $3,183.57, "	318 35
" " distribution of property in kind of value of $114,456, at 3%	3,433 68
	$5,468 29

Total commissions allowed in said return	$5,468 29
Total commissions allowed in this report on said return	2,346 45
Difference	3,121 84

In said first return the adm'rs are entitled to additional credit of $240 for note received as credit on W. W. Tumlin's note on Mrs. Lula T. Lyon; also on Mrs. Gray's sale bill, $1,477.72, thus leaving a balance in hands of adm'rs, Gray and Erwin, at time of 1st return of $5,583.11.

For a part of which sum, to wit, $4,444.63, they have not accounted, and for which they and their sureties, on subsequent bonds given by Gray, are liable.

The only part of the $5,583.11 accounted for is $2,616.20, less $1,477.72—that is, $1,138.48, leaving said sum of $4,444.63 unaccounted for.

* * * * * * *

220 *Amounts for which the Several Sets of Sureties are Liable.*

88. My opinion is and I also report that the discharge of John A. Erwin as one of the administrators did not discharge the sureties on Gray and Erwin's bond, and that they never have been discharged, and are therefore still liable for the waste or default of the joint administration of Gray and Erwin and since of the sole administration of Gray. Items 39 & 40 of this report.

The bondsmen of Gray and Erwin are liable solely for $4,444.63 principal and for $699.92 int., and are concurrently liable with the sureties on Gray's individual bonds to the present time, as hereinafter stated.

Next, as to the liability of the sureties on the subsequent bonds given by Gray, I find the sureties on the bond given May 2, 1876, which was superseded by bond given Oct. 13, 1877 (items 13 & 20), are liable for $7,942.49 prin. & $1,250.95 int.

This bond was not a substitute for the bond given by Gray and Erwin, but was an additional bond, and hence is not covered
221 by sections 1817 and 2509 of the Code of Georgia, and therefore the sureties on this bond are not liable for the waste or default of Gray and Erwin committed or suffered before May 2, 1876, the date of their bond.

The sureties on next bond given, Oct. 13, 1877 (item 20 of this report), are liable for the waste and default of Gray, adm'r, committed and suffered both before the giving of the bond back to the resignation of Erwin and afterwards to the giving of the new bond, May 6th, 1878, this transaction falling under and being covered by said section of the Ga. Code, 1817 and 2509.

The am't for which these sureties are liable is:

Prin.	13,276 06
Int.	2,090 97

For a part of this sum, to wit:

Prin.	7,942 49
Int.	1,250 95

The sureties on this bond are concurrently liable with the sureties on the former bond, to wit, bond given May 2d, 1876.

The sureties on the last bond are liable for all waste or
222 default of Gray, adm'r, subsequent to Irwin's discharge, to wit:

Prin.	$20,965 96
Int.	3,302 75

For a part of this sum, to wit:

Prin.	7,942 49
Int.	1,250 95

The sureties on said bond given May 2d, 1876, and sureties on bond given October 13, 1877, are concurrently liable with sureties on this last bond.

For another part of this sum, to wit:

Prin.	$13,279 06
Int.	2,092 07

The sureties on said bond, given Oct. 13, 1877, are concurrently liable with sureties on this last bond.

The sureties on the bond of Gray and Erwin are concurrently liable with all the other sets of sureties for said several sums for which said several sets of sureties are liable.

Remarks.

Recently, to wit, on Sept. 20, 1883, two of the sureties on bond of Gray and Erwin, to wit, Henry C. Erwin and J. G. Erwin, made application to me to be permitted to introduce evidence to show that they never signed nor authorized any one to sign their names to a joint bond of Gray and Erwin, but only to J. A. Erwin's
223 bond. At — same time said two sureties exhibited to me a sworn paper, in form of an amendment to their answer, setting up said facts, and the solicitors of said two sureties stated he would, as soon as the U. S. court opened, apply to the court for permission to file said paper as an amendment to said former answer. Solicitors for complainant objected to hearing the evidence offered, and I refused to hear it on the ground that the issue proposed to be made was not involved in the pleadings referred to me, and that I had no authority to pass upon that point.

Claims Outstanding against Said Estate.

88. There is a balance due against the estate—

1. On the *fi. fa.* of N. L. Augier, trustee, etc., John Neal, transferee, *vs.* F. P. Gray, adm'r, etc., prin.	$7,060 48
Int. to July 1, 1881	164 74

The notes on Young and Eaves are held as collateral to secure this claim.

2. John Neal *vs.* Thomas Tumlin, prin., and F. P. Gray, adm'r, *fi. fa.*, prin.	1,456 94

Bearing int. at 10 pr. ct. from Nov. 1, 1881.

224 3. Claim of James L. Rice and assoc-ates for money paid on behalf of the estate on *fi. fa.* of Pique, Manier, Hall & Co., $1,435, with int. from July 5, 1881. See *ante*, items 51–52	$1,435 00

4. Elizabeth Stokes, ex'x, *vs.* Lewis Tumlin, *fi. fa.*, prin.-- 150 00
Int. to July 1, 1881---------- 138 91

5. W. K. Moore, Esq., claim for att'y's fee, prin.---------- 150 00
Int. from July 28, 1881.

6. John Eaves (Planters' and Miners' Bank), transferee, *vs.* B. G. Poole & Co., prin. ---------- 26 60
Int. to July 1, 1881---------- 12 45

7. Dabney & Fouché, claim for att'ys' fees for services to the estate ---------- 105 00
Int. to July 1, 1881---------- 6 55

8. Akin and Akin, att'ys' fees for services to the estate-- 40 00

9. Cost *fi. fa.*, Jas. Willingham & Co. *vs.* E. E. Field and Gray, adm. of Lewis Tumlin, balance---------- 21 57

10. William T. Wofford *vs.* Gray, adm'r, prin. ---------- 325 00
Int. to Aug. 1, 1881---------- 84 59

This was suit in Bartow sup'r court for $1,350.00, besides
225 interest. This was referred to me as special master by consent of parties. Much evidence was taken, and report of it accompanies this report.

11. J. A. Howard, cost bill---------- $43 00

12. Claim of D. W. K. Peacock for surveying lands of the Tumlins' estate ---------- 125 00

13. J. J. Howard & Son *vs.* J. M. Neel, receiver, claim to $850 on draft drawn by A. Johnson and accepted by Gray, adm'r. This was referred to me, and after hearing evidence I found against the estate, prin. ---------- 658 75

With interest from Nov. 1, 1881.

The evidence taken in said case and master's report is filed with this report.

14. T. Stephens *vs.* Tumlin's estate.

This list of outstanding claims is imperfect, as there — other claims outstanding against the estate not proven before me.

The following are witness fees for attendance before me on hearing as special master:

1. W. T. Wofford, one day's attendance---------- $1 50
2. W. W. Rich, " " " ---------- 1 50
3. Dr. E. W. Brown, 2 days' attendance---------- 3 00
226–229 4. F. M. Martin, 1 day's attendance ---------- 1 50
5. John Terrell, 1 " " ---------- 1 50
6. James M. Smith, 2 " " ---------- 3 00
7. T. C. Moore, 1 " " ---------- 1 50
8. J. H. Mabry, 2 " " ---------- 3 00
9. W. W. Scott, 1 " " & mileage---- 6 50
10. N. Gilreath, 3 day- @ 4.50, & mileage, 4.80---------- 9 30

11. W. T. Wofford claim- 1 day as witness & mileage, $5.00; under subpœna of John Neal he claims $6.50.
12. Wm. T. Burge, 1 day ---------- 1 50

The above claims are correct and should be paid by such party as the court may direct.

* * * * * * *

230 This ends the report, so far as I am able to make it, and it is respectfully submitted.

Sept. 22d, 1883.

E. N. BROYLES,
Special Master.

231 *Bill, etc. Relief & Injunction. Receiver.*

In United States Circuit Court for the Northern District of Georgia.

In Re JAMES L. RICE & WIFE

vs.

FRANK P. GRAY and Others.

Exceptions taken by the defendants following, to wit: W. I. Beaham, R. L. Rogers, A. C. Trimble, A. W. Mitchell, J. M. Veach, J. J. Howard, H. C. Erwin, J. G. B. Erwin, and H. C. Ramsauer, adm'rs, &c., to the report of E. N. Broyles, Esq., special master, to whom the cause stands referred by decree heretofore made.

Exception 1st. For that the said master has by his said report certified that he was of opinion that the discharge of John A. Erwin, as co-administrator, did not discharge him as surety for his co-administrator, Frank P. Gray, and for that he has further certified that he is of opinion that the order of the ordinary of Bartow county made on the — day of May, 1876, discharging the sureties of Erwin & Gray on their bond, as administrators of Lewis Tumlin, deceased, was a nullity and did not in fact release said sureties.

Under the 1st exception reference is made here to pages 11, 12, & 13 of the said special master's report; also to pages 23 & 24 & 25 of said report.

Exception 2nd. For that the said master hath in and by
232 his said report certified that he was of the opinion that the order was passed by the ordinary of Bartow county bearing date on the — day of May, 1876, which order allowed said John A. Erwin's resignation as one of the administrators on said estate of Lewis Tumlin, deceased, and discharge- him from his trust as administrator, and relieve- his securities from all further liability, was not effectual as a discharge of the sureties on the bond given by said Gray and Erwin jointly, because the said sureties had presented no petition to said court of ordinary praying for discharge from said bond, and on this point further certifying that he was of the opinion that the discharge of Erwin by the court of ordinary did not in legal effect discharge the sureties on the bond of said Erwin and Gray, as

joint administrators, but that they remained bound therein as the sureties of said Gray, as sole administrator, whereas, in fact and as a question of law, the said special master should have found as to the two foregoing exceptions: 1, that the discharge of John A. Erwin, as co-administrator, upon his resignation, discharged him as surety for his co-administrator, and, 2, that the legal effect of his said discharge discharged all the sureties on said joint bond given by said John A. Erwin and F. P. Gray, as administrators on said estate of Lewis Tumlin, deceased, without any petition or application on their part to said court of ordinary or by any one else for them. See pages 11, 12, 13; also 23, 24, & 25 of said special master's report, to which reference is made.

233 Exception 3rd. For that the said master hath in and by his report certified that at the May term, 1876, of the court of ordinary in and for the county of Bartow said court of ordinary granted the petition of John A. Erwin to resign his administratorship, and by the same order appointed Frank P. Gray sole administrator, and required him to give new bond and security as such, and further ordering that the said John A. Erwin, after settlement with said Frank P. Gray, as his successors, together with his securities, be discharged from all liability for any mismanagement of said estate in the future, but not for any past liability of said John A. Erwin as administrator, and has also certified that the order of said ordinary permitting the said John A. Erwin to resign and appointing said F. P. Gray sole administrator was appealed from and the case carried to the superior court of Bartow county, and then, on August 4, 1876, affirmed by verdict of a jury; and, notwithstanding these recitals by the said special master, he has not found and certified that the said John A. Erwin, as administrator, together with his sureties, were discharged, whereas he should have certified that the court of ordinary of Bartow county was a court of original, general, and exclusive jurisdiction of all matters pertaining to the administration of estates, and that its orders on this subject were exclusive until reversed by appeal or other legal method, and should also have found that in accordance with the terms of said

234 order so granted by said court of ordinary said John A. Erwin was discharged from his trust as administrator on said estate as well as discharged as surety of his co-administrator, F. P. Gray, together with all the sureties on said bond. See pages 11, 12, & 13 of said special master's report; also pages 23, 24, & 25 of said report, to which reference is made.

Exception 4th. For that the said special master hath in and by his said report gone beyond the allegations and charges of the complainant's bill of complaint in this cause to consider and report upon the liability of John A. Erwin and the sureties on the bond made by him and F. P. Gray as joint administrators on said estate of said Lewis Tumlin, deceased, whereas he should have confined himself to the allegations and charges of said bill by said complainants, which did not intimate any liability against the said John A. Erwin or the sureties on the bond which the said Erwin signed as administrator, but, on the contrary, treats the resignation of said

John A. Erwin and the discharge of him and his sureties by the ordinary of Bartow county as their liability. These defendants refer to the original bill of complaint filed by the complainant in this cause, which constituted the pleadings on the part of complainant at the time of the reference of said cause to said special master.

235–239 Exception 5th. For that the said special master hath in and by his said report reduced the commission and fees allowed the administrators, John A. Erwin and F. P. Gray, for the division of land among the heirs, which was three per cent. on the value of the land so distributed and which commission and fees amounted to $3,433.68 to the sum of $500.00, holding that the order of the ordinary of Bartow county making this allowance to said administrators was not conclusive, and that said allowance was not sustained by the evidence submitted to him, whereas said special master should have held that the said order making said allowance was conclusive on the parties interested, and that the evidence sustained said allowance as reasonable and not excessive. See pages of evidence referred to in master's report on this subject, which these defendants insist sustains the exceptions and shows that said allowance to said administrator was reasonable and just compensation allowed for the services rendered. See pages 26 & 27 of special master's report, to which defendants pray leave of reference.

T. W. MILNER,
MYNATT & HOWELL,
Sol's for Veach et al.

Filing.

Filed in clerk's office Oct. 11, 1883.

R. E. BOYD,
Deputy Clerk.

* * * * * * *

240 5th exception. Complainants except to the ruling of the special master in item 39 of his report in holding that there was a valid resignation and discharge of John A. Erwin from his office as administrator, dating June 12, 1876, and for cause of exception say that said report shows that on April 11th, 1876, John A. Erwin filed his petition in the court of ordinary for leave to resign; that at the May term, 1876, the ordinary grants said John A. Erwin's request to resign his trust, &c., and this decision allowing him to resign was appealed from and carried to the superior court of Bartow county, Georgia, and that while it was thus
241 pending on the appeal in the superior court the ordinary passed an order June 12, 1876, finally discharging said John A. Erwin from his said office and trust as adm'r.

Complainants now insisting that while the question of whether or not said John A. Erwin should be allowed to resign was pending on the appeal in the superior court, the court of ordinary had no right to pass an order or render any judgment in the premises, and that the judgment expressed by the special master in item 16, page 13,

of his report, that the first decision of the ordinary at the May term, 1876, allowing John A. Erwin to resign was affirmed by the verdict of the jury in the superior court on August 8th, 1876, is incorrect. There being, as shown by said report in item 16, page 13, no judgment entered upon said verdict, complainants insist that the presumption is that said verdict was illegal or for some reason void, or that the judgment was arrested.

And so complainants except to the finding of the master in holding that said John H. Erwin has legally resigned or been discharged from his said office, and they say that the appeal of said case to the superior court suspended all further action on the questions involved in the court of ordinary, and that said case is still pending on the appeal in said superior court of Bartow county, Ga., so far
242–253 as is shown by the evidence submitted in this case and the report of the special master, and said John A. Erwin is still one of the adm'rs of said estate.

* * * * * * *

254 13th. Complainants except to said special master's report where it allows said administrators credit in voucher # 44 in the return of 1877 and # 4 in the return of 1878 and # 22 in the return of 1879 and # 29 in the return of 1880 and No-. 1, 13, 27, 33, 41, and 44 in the return of 1881, for the aggregate amount of $2,791.33 for fees paid by Frank P. Gray, as adm'r, to the law firm of Stansell and Wofford. These vouchers contain no itemized account of the services rendered by said law firm for said estate, and on the hearing before said special master a demand was made by complainants upon said Gray, adm'r, for an itemized account of these services and said special master ordered the same to be furnished, but no itemized account of the same has been as yet furnished to complainants; and, besides, complainants insist that the whole sum of these fees *are* tainted with the unlawful contract between Frank P. Gray, adm'r, and said law firm testified to by A. P. Wofford—evidence, page- 41 & 42—by which contract said Gray was to divide with Stansell and Wofford. Complainants insist that said special master ought to have disallowed all of said vouchers as credits to said adm'rs,
255 and if disallowed their liability would be increased as follows:

For principal	$2,791 33
For interest to Oct. 1st, 1883	832 13
Sum total	$3,623 46

14th. Complainants except to the ruling of the special master allowing the adm'r's credits for vouchers # 4 and 55 in the return of 1877 and voucher # 21 in the return of 1878 and vouchers # 1 and 4 in the return of 1880 and vouchers # 2, 3, and 14 in the return of 1881 and which purport to be Gray's traveling-expense accounts.

Complainants insist that they are wasteful and extravagant on their face, which destroys their *bona fides*, and in one of said vouchers is an amount of $150.00 claimed to be paid by said Gray, adm'r, to

one C. B. Wellborn, in the State of Texas, on a debt due by Lewis Tumlin in his life to said Wellborn, and yet said Gray, adm'r, produces no evidence of said debt, if there ever was a debt, from said Wellborn and no voucher for said payment. Complainants insist that the greater part, if not all, — the credits claimed by said adm'rs in said vouchers ought to have been rejected and disallowed, under the evidence in said case, by said special master, as com-
256–287 plainants insists that the *prima-facie* character of said returns *were* overcome and destroyed, and if said credits are disallowed it would increase liability of adm'rs—

Principal	$942 81
Interest	362 59
	$1,305 40

288 *Petition of J. M. Veach and Others.*

In Circuit Court of the United States for the Northern Dist. of Georgia. In Equity.

JAS. L. RICE & WIFE *vs.* FRANK P. GRAY *et al.*

To his honor the circuit judge presiding in said court:

The petition of J. M. Veach, W. J. Benham, A. C. Trimble, J. J. Howard, R. L. Rogers, A. W. Mitchell, J. G. B. Erwin, H. C. Erwin, and H. C. Ramsauer, adm'r, most respectfully represents that they were made parties defendant by subpœna when this suit was commenced, but they were informed and believed that there was no liability upon them or either of them, except for the acts of John A. Erwin, one of the administrators of Lewis Tumlin, deceased; that said Erwin resigned the administration in May, 1876, having served only about nine months. Petitioners never heard of any default on the part of said Erwin while he was administrator, and they are advised that there are no charges of any delinquency in the bill filed in this cause made against the said John A. Erwin, but all the charges are directed against Frank P. Gray, who was his co-administrator and successor. Indeed your petitioner, R. L. Rogers,
289 was told by one of the counsel for complainants, after the bill was filed, that there was no purpose on the part of the complainants in said bill to hold the sureties on the bond of Gray and Erwin liable for the conduct of Gray after the resignation of Erwin. Petitioners will further state that, as they understood, it was only because of some matter of overcharge of fees made by Frank P. Gray while Erwin was administrator, amounting to about the sum of three or four thousand dollars, that they were made parties to the bill.

Your petitioners therefore filed no answers, nor have they made any defense until within the last few months, since the making up of the report of the special master in this cause. They were surprised to learn that the master had found that the sureties on the joint bond of Gray and Erwin were held liable for the conduct of Gray after the resignation of Erwin. Your petitioner- had been in-

formed, at the time of the resignation of Erwin, that they were likewise discharged by the same order of the court of ordinary, and never gave themselves any more concern about it. If they had thought that there was any liability upon them after the resignation of Erwin and the order discharging them as his sureties they would each one have taken steps to have been relieved.

290 Petitioners will further state that they have filed answers in this cause, to wit, the answer of H. C. and J. G. B. Erwin, filed in office Sept. the 13th, 1883; also the answer of J. M. Veach, W. J. Benham, A. C. Trimble, J. J. Howard, R. L. Rogers, and A. W. Mitchell, filed in office Oct. 9th, 1883; also the answer of H. C. Ramsauer, adm'r, filed in office Oct 4th, 1883; all of which they pray may be considered a part of this petition and read in connection therewith. They also pray that the affidavit of H. C. and J. G. B. Erwin and of John A. Erwin may be read in connection with this petition to the end that these petitioners may have advantage of the facts set out by the said J. G. B. Erwin & H. C. Erwin and John A. Erwin touching change made in the powers of attorney made by J. G. B. Erwin, H. C. Erwin, and L. R. Ramsauer. These petitioners pray that the matters touching said charge may be referred to the special master in this cause; that he may hear evidence and report as to the circumstances under which said change was made, and the effect of said change or alteration in said powers of attorney upon the rights and liabilities of the co-sureties in the bond of F. P. Gray and John A. Erwin, as administrators. Petitioners further pray that their answers alluded to above may be

291 considered as having been properly filed and of record in the cause.

And your petitioners will ever pray, etc.

T. W. MILNER.
MYNATT AND HOWELL,
Sol's for Defendants.

UNITED STATES OF AMERICA, *Northern District of Ga.:*

You do swear that what is stated in the foregoing petition is true to the best of your knowledge and belief, so help you God.

J. M. VEACH.
A. W. MITCHELL.
R. L. ROGERS.

Subscribed and sworn to before me this Nov. 21, 1883.

A. E. BUCK,
U. S. Com'r.

Subscribed and sworn to before me as to A. W. Mitchell and R. L. Rogers this Nov. 22d, 1883.

A. E. BUCK,
U. S. Com'r.

Filing.

Filed in office Nov. 21, 1883.

A. E. BUCK, *Clerk.*

292 *Order Allowing Defendants to File Answers.*

In the Circuit Court of the United States for the Northern District of Georgia. In Equity.

JAS. L. RICE and WIFE *vs.* FRANK P. GRAY *et al.*

In this case it is ordered that the defendants, H. C. Erwin, J. G. B. Erwin, H. C. Ramsaur, J. M. Veach, W. J. Benham, R. L. Rogers, A. C. Trimble, A. W. Mitchell, and J. J. Howard be allowed to file answers on condition that they do not delay the cause and consent to go at once before the master on the questions and issues made.

In open court, Nov. 24th, 1883.

DON A. PARDEE, *Judge.*

Filing.

Filed in office Nov. 24th, 1883.

A. E. BUCK, *Clerk.*

293 GEORGIA, *Gordon County:*

Know all men by these presents that I, John G. B. Erwin, of the county and State aforesaid, do hereby appoint Henry C. Ramsaur, of the county of Bartow and State aforesaid, my lawful attorney to sign my name as security on a bond to be given by J. A. Erwin and F. P. Gray, administrators on the estate of Lewis Tumlin, late of Bartow county, dec'd, for six hundred thousand dollars for the purposes therein expressed in said bond, and my name so signed under this power of attorney shall be as binding on me as if I had personally signed the same.

J. G. B. ERWIN.

This 22 July, 1875.

A. J. HUTCHISON, *J. P.*

Recorded in book of bonds, page 341, August 4th, 1875.

J. A. HOWARD, *Ordinary.*

GEORGIA, *Bartow County:*

I, J. A. Howard, ordinary in and for said county, do hereby certify that the above is a full, true, and complete copy of the original power of attorney made by J. G. B. Erwin, as appears of file and record in the ordinary's office of said county, same showing the erasures and interlineations in said power of attorney as appears in the original.

Witness my hand and seal Sept. 13, 1883.

J. A. HOWARD, *Ordinary.*

294 GEORGIA, *Gordon County:*

Know all men by these presents that I, Henry C. Erwin, of the county and State aforesaid, do hereby appoint Henry C. Ramsauer, of the county of Bartow and State aforesaid, my lawful attorney to sign my name as security on a bond to be given by J. A. Erwin & F. P. Gray, administrators on the estate of Lewis Tumlin, late of

Bartow county, dec'd, for six hundred thousand dollars for the purpose therein expressed in said bond, and my name so signed under this power of attorney shall be as binding on me as if I had personally signed the same.

This 22 July, 1875.

H. C. ERWIN.

A. J. HUTCHISON, *J. P.*

STATE OF GEORGIA, *Bartow County:*

I, J. A. Howard, ordinary in and for said county, do hereby certify that the above and foregoing contains a full, true, and complete copy of the power of attorney, as made by H. C. Erwin, authorizing Henry C. Ramsaur to sign the administrators' bond of J. A. Erwin and F. P. Gray, as adm's of the estate of Lewis Tumlin, dec'd, as appears of record and file in the ordinary's office of said county, and that the same shows the erasures and interlineations as they appear in the original power of attorney of file.

Witness my hand and seal of office Sept. 15, 1883.

J. H. HOWARD, *Ordinary.*

295 Western Union Telegraph Company.

2 ch. A. W'n. 7 paid.

824 A. 9, 20, 1883.

Sweetwater, Tenn. 20. H. C. Ramsaur, care Markham House.

An.—It was interlined after it was signed.

HARRY J. ERWIN.

Western Union Telegraph Co.

No. 12.

H. C. Ramsaur, cr. Markham House.

Charges paid.

Bill in Equity.

In U. S. Circuit Court.

RICE and WIFE *vs.* F. P. GRAY and Others.

Personally came J. G. B. Erwin and H. C. Erwin, who on oath say that they were duly served with subpœna at the commencement of above-named suit; that they regarded themselves as the sureties of John A. Erwin who had been discharged as administrator by resignation in the year 1876, soon after the commencement of the administration, and these deponents were under the impression that they, too, were released by the order of the ordinary, and
296 they regarded the suit, as against him and his sureties, as an effort to hold them liable for whatever might have been his delinquencies during his administratorship; besides, John A. Erwin told these deponents that he would make whatever defense was nec-

essary in the matter, and feeling that they were liable only for him and his acts, they gave the matter no further attention at the time. After the case had progressed until the latter part of August last, this deponent, J. G. B. Erwin, met with an attorney from Whitfield county, to wit, Tom Jones, who is at present senator from his district, who told this deponent that he was about to be held liable by Col. Broyle, the special master, as one of the bondsmen of Frank P. Gray. This was a surprise to deponent, and he at once communicated the fact to his brother, H. C. Erwin. These deponents did not regard themselves as the sureties of Frank P. Gray because they had not signed his bond, but had signed only a power of attorney authorizing Henry C. Ramsaur to sign their names to the bond of John A. Erwin as one of the administrators of the estate of Lewis Tumlin, and this deponent, J. G. B. Erwin, remembers to have stated at the time that he did not desire to be the bondsman of Frank P. Gray for the reasons then given, the name of Frank P. Gray having been in some way mentioned in connection with the administration of said estate.

297 However, this information from said Jones put deponents upon investigation of the facts. After thinking for some time about it and going to Tennessee to see John A. Erwin, who was too sick and undisposed to be conferred with much about it, this deponent, H. C. Erwin, with Judge McCutcheon, of Dalton, went to Cartersville on Sept. 10 inst. and examined the powers of attorney originally signed by both these deponents and found that the words "as one of the" stricken out and the words "& F. P. Gray" interlined in both the powers of attorney—the one executed by H. C. Erwin and J. G. B. Erwin. This was the first knowledge these deponents had of this erasure and interlineation. These deponents both say that the original powers of attorney as signed by them bore no erasure or interlineation when they signed them. Deponents then at once set about the employment of counsel and the preparation of their joint answer, which appears of file in this cause. They did not know the facts sooner nor did they know anything to put them upon inquiry. Soon after the commencement of the suit this deponent, J. G. B. Erwin, met with John W. Aiken, attorney-at-law, Cartersville, Ga., when said Aiken told this deponent that there were some interlineations in the bond, or words to that effect, as this deponent understood him, but it never occurred to this deponent that his power of attorney had been interlined

298 so as to authorize any one to sign his name to the bond of F. P. Gray, nor had he any fact to put him upon notice that his name had been signed to any such bond. As stated above, these deponents both say that they supposed themselves to be the bondsmen of John A. Erwin only, and that they would be held liable for him only, which liability they did not expect to evade or attempt to evade, and that he, the said John A. Erwin, would make all proper defenses to the case; and further these deponents say that they felt doubly assured and were thrown off their guard by the fact that John A. Erwin had taken a bond of indemnity to insure him against any loss he might sustain by being an administrator, and not until

recently, to wit, the last of August last, did these deponents know that the solvency of that bond was seriously in question. These deponents feel that they have not been guilty of any negligence in making this defense. It seems to them they have made it as early as it was possible for them to make it. They make it in good faith, and believe that they will be relieved thereby when all the facts are properly before the court. These deponents exhibit herewith copies of the powers of attorney mentioned above for the inspection of the court. The erasures and interlineations show for themselves.

299 The said powers of attorney were signed simultaneously.

J. G. B. ERWIN.
H. C. ERWIN.

Sworn to and subscribed before me this September 20, 1883.

[SEAL.] J. H. JONES,
Notary Public, Fulton Co., Ga.

The said deponents further swear that at the request of deponent, H. C. Erwin, Henry C. Ramsaur sent a telegram from Cartersville, Ga., on September 19, 1883, to Harry J. Erwin, a son of John A. Erwin, who is confined to his bed, and on this account his said son attends to his father's business, asking if the said interlineations and erasures were not made in said powers of attorney before they were signed, as already stated by deponents, and that on this day an answer came to said Ramsaur, signed by said Harry J. Erwin, stating that said interlineations were made before the powers of attorney were signed; that deponent, H. C. Erwin, opened said telegram, as he was authorized to do so by said Ramsaur, who is a nephew of said John A. Erwin, and that said Harry J. Erwin is familiar with the business of his said father, lives in the same house with him, and is authorized to act for him, and that these deponents are confirmed in their statements made in their said answer

300 and in the foregoing affidavit by the statement, as they regard it, of John A. Erwin, and reiterate and reaffirm with the utmost confidence what is set out in their answer and in said affidavit. They attach said telegram hereto.

H. C. ERWIN.
J. G. B. ERWIN.

Sworn to and subscribed before me Sept. 20, 1883.

J. H. JONES,
Notary Public, Fulton Co., Ga.

Filing.

Filed Nov. 26, 1883.

A. E. BUCK, *Clerk.*

301 *Affidavit of John A. Irwin.*

STATE OF TENNESSEE, *Rhea County:*

Before the undersigned, Taylor Russell, one of the justices of the peace in and for said county of Rhea, in person came John A. Er-

win, who, being duly sworn, on oath says that soon after the death of Lewis Tumlin in Bartow county, Georgia, the family and heirs of said Tumlin urged deponant to become one of the administrators of the estate of said deceased in connection with Mr. Frank P. Gray. Deponant first declined, but afterwards yielded and consented to become one of the administrators, and afterwards, deponants thinks in July, 1875, he went to Fairmount to see L. R. Ramsaur, J. G. B. Erwin, and Henry C. Erwin about becoming sureties. Deponant drew up three powers of attorney, one for each of them to sign, authorizing Henry C. Ramsaur to sign their names, respectively, to a bond to be given by depona nt as one of the administrators on the estate of Lewis Tumlin, late of Bartow county, deceased, and the said L. R. Ramsaur, J. G. B. Erwin, and Henry C. Erwin, each signed the separate power —, which I had drawn as aforesaid, and each having in substance the stipulation aforesaid in it, as
302 well as deponant can remember. Deponant then took those powers of attorney to Cartersville, Ga., where said Henry C. Ramsour was then living, delivered said powers of attorney and got him to sign the names of said L. R. Ramsour, J. G. B. Erwin, and H. C. Erwin to the bond of deponant and F. P. Gray as administrators of said estate. Some short time after the bond was signed by said H. C. Ramsour as att'y for said sureties, perhaps in the course of a week or two thereafter, Mr. J. A. Howard, the ordinary, brought said powers of attorney to deponant's store and told deponant that said powers of attorney were informal and pointed out the informality and showed deponant how to correct it, and deponant then made the correction which Mr. Howard pointed out. The change consisted in striking out some words and interlining the name of F. P. Gray, so that the powers of attorney would authorize the names of the makers thereof to be signed to the bond of deponant and said Gray as administrators, instead of the bond of deponant as one of the administrators, as it was expressed in the powers — as they originally stood. When deponant approached the said L. R. Ramsour, J. G. B. Erwin, and H. C. Erwin to get them to become sureties deponant told them that deponant and said Gray were both to become administrators on said estate,
303 and that Mr. Rice, a son-in-law of said Tumlin, was also to be one of the administrators, it being then expected that said Rice would join in the administration. In making the alteration referred to it never occurred to deponant that the change would or might change the liabilities of said sureties in any way, but regarded it as simply a formal matter that was necessary in order that the papers might properly go to record, and the impression made upon deponant's mind at the time by the statement of the ordinary to him about it was that it was simply a formal matter.

Deponant attached no sort of importance to said alteration in any way, and for this reason never named it to either of said sureties, as he certainly would have done if he had not regarded it as an immaterial matter and the whole thing had passed out of his mind until he has been recently refreshed about it. I was of the impression that when there was a co-administration on an estate a surety

for one administrator was necessarily a surety for both, and bound for the acts of both, no matter how he might sign. Deponant had never before then had anything to do with the administration of any estate.

304 JOHN A. ERWIN.

Sworn to and subscribed before me this Sept. 24th, 1883.
TAYLOR RUSSELL, *J. P.*

Filing.

Filed in office Nov. 26th, 1883.
A. E. BUCK, *Clerk.*

305 United States Circuit Court, Northern District of Georgia. In Equity. Sept. Term, 1883.

JAMES L. RICE & WIFE, Complainants,

vs.

FRANK P. GRAY, Adm'r, and others, Defendants.

This cause having been heard on the special master's report in the cause and the various exceptions of parties on file, and the same having been fully argued, considering *the* until now the issues have not fully been made up, and that on several matters evidence should be taken, and that therefore a recommittal to the special master is necessary, it is ordered that this cause be recommitted to the special master for further investigation and report.

And, considering the necessity of determining the rights of the several parties defendant as between themselves as well as their several liabilities to the complainant, the special master is instructed as follows:

1. To report the state of the account between the estate of Lewis Tumlin and Gray, administrator, and the several liabilities resulting therefrom to the date of the order of discharge of Erwin and his sureties by the ordinary of Bartow county.

2. To report the account between the estate of Lewis Tumlin and Gray, administrator, and the several liabilities resulting therefrom from the date of Erwin's discharge as aforesaid.

306 3. To compute interest and charge the administrator according to the rules laid down in Georgia Code, sections 2601, 2602, & 2603.

4. To allow no commissions to the administrator in any return where by the evidence it appears that moneys received by the administrator for the estate before the return was made have not been accounted for in said return.

5. To allow no commissions to the administrator on any money received or paid out by said administrator for said estate where no return was made thereof or therefor until after service of the bill in this case, unless it shall appear by the evidence that return was made within a delay allowed by law or by the ordinary of Bartow county.

6. To report in regard to the pledge of notes belonging to the es-

tate of Tumlin, as collateral, to secure the Augier *fi. fa.* against said estate made by Administrator Gray on the 4th of March, 1881, to Akin & Akin for John Neal, as to whether the said pledge was lawful and binding on the said estate.

7. To disallow and reject all charges or claims of Gray, administrator, when by the evidence it appears that the same were incurred in procuring by improper means or in suppressing evidence in cases — which estate of Tumlin was a party without a reference to the result, as benefitting the estate of Tumlin or not.

307 8. To disallow and reject all charges of Gray, administrator, for amounts paid by him as attorneys' fees or commissions for services rendered to or on moneys collected for the estate of Tumlin, where it shall not appear from the evidence that said amounts were actually and in good faith paid, and that said administrator retained or had no personal interest therein, or where it shall appear that there was any contract or understanding between the attorneys employed and said adm'r that there should be a division of fees or commissions.

9. The attention of the special master is called to the exceptions on file relating to alleged clerical mistakes and erroneous computations of interest against and in favor of the administrator, Gray, and to alleged errors in stating account of advances to the heirs of Lewis Tumlin, deceased.

10. The master is further instructed to so limit the time allowed the parties to bring in additional evidence that the cause may be speeded and a report made by rule day in February, 1884.

In open court Nov. 26th, 1883.

DON A. PARDEE, *Judge.*

Filed in clerk's office November 26, '83.

R. E. BOYD,
Deputy Clerk.

308 *Returns.*

The following statement of the account between the estate of Lewis Tumlin, deceased, and Gray and Erwin, adm'rs, and of said estate against Gray, sole adm'r, is based on the former report made in this case by the special master, E. N. Broyles, and the directions of the circuit judge in the order passed November 26, 1883, recommitting the matter to said special master, and the several findings made by said special master on the several exceptions filed to said former report, some by complainants and some by Gray, and on the new or additional evidence and pleadings in the case of James L. Rice and wife and others *vs.* Frank P. Gray, adm'r, and others, in circuit court U. S., northern district of Georgia.

Return by Gray and Erwin to May 6, 1876. The former report made on said return is not changed in any respect as to items, except all commissions allowed the administrators in the former report are disallowed in this.

See report on 1, 2, 3, and 4 exceptions filed by complainants.

Bal. in hands of adm'rs when 1st return was made, as shown by former report, was $5,583.11.

This, but for mistake in addition, would have been $5,623.71, a mistake of $40.60.

As in the former report, the sum of $2,346.45 was allowed the adm'rs as commissions, and, as in this report they are not allowed any commissions, this leaves in hands of adm'rs at time 1st return was made $5,623.71 plus $2,346.45, or a total of $7,970.16.

309 Of this sum the adm'rs accounted for and carried forward to next return $1,138.48, leaving unaccounted for by said adm'rs, and for which they and their sureties are bound, $6,831.68.

1877, 1*st Return by Gray Alone.* 2*d Return.*

DR.

Amount bro't from 1st return	$7,970 16
Am't collected on note of W. M. Tumlin June 1, 1876	201 00
Am't collected from Bridge Co. Dec. 6, 1876	9 50
Bal. on J. J. Hainey note	30 53
Bal. on E. M. & E. T. Price note, prin	45 50
Int. to July 1, 1877	4 99
Note on W. W. Rich & Bro., due Dec. 25, 1875, pr.	238 86
Int. to July 1, 1877	26 24
Bishop note, prin.	50 00
Int. to July 1, 1877	17 19
Bal. on W. C. Baker note	52 36
W. L. Goodman note, prin.	80 00
Int. to July 1, 1877	24 70
Value of Clayton place	1,000 00
Int. from Nov. 1, 1876, to July 1, 1877	46 66
	$9,797 69
Am't received by adm'r since 1st return	12,052 77
Int. on $2,745.01 from Aug. 2, 1876, to July 1, 1877	175 58
	$22,026 04

CR.

310 Vouchers 8, 44, and 55 in return of 1877 being disallowed. See former report, p. 73, as to voucher 8, and as to vouchers 44 & 55 see this report on 13th & 14- exceptions filed by complainants, and the adm'r being allowed no commissions under rule before stated, he, on July 1, 1877, is entitled to a credit of $5,225.15 for disbursements.

That is, total assets on hand July 1, 1877	$22,026 04
Credit	5,225 15
Bal. due estate July 1, 1877	16,800 89

Increase of adm'r's liability between May 6, 1876, and July 1, 1877, $8,830.73.

The sum of $2,745.01, on which interest is as above calculated on, is the difference between the assets on hand May 6, 1876, and the amount paid out between that date and July 1, 1877.

See this report on exceptions 16, 17, 18, 19, and 20 filed by complainants and report on 15th exception filed by Gray.

3d Return. July 1, 1878.

DR.

Am't bro't from 2d return	$16,800 89
Sept. 28, 1877, note on Gilbert, Tumlin & Jackson, prin.	320 00
Int. from Dec. 25th, 1875, to July 1, 1878	58 23
Collection on N. J. Tumlin's note Feb. 5, 1878	100 00
" on John S. Leak's note Oct 13, 1877	450 00
" collected since 2d return	9,856 00
Int. on $12,660.04, 1 y'r to July 1, 1878	886 20
	$28,471 32

311 CR.

Money paid out during the year as by the return was $5,552.36, but certain vouchers going to make that sum are disallowed as follows: Vouchers 1, $10; ½ of 2, $33.33; 3, $3.55; 5, $3.45; 6, $100; 8, $100; 9, $100; 10, $90; 11, $100; 12, $70. These vouchers are rejected under exception 12 by complainants. The following vouchers in return of 1878 are rejected under exception 13th filed by complainants, to wit: The following items in voucher 4, $6.50, $25.75, $13.85, $14.00, $265.33, & $241.75. The following items are rejected from voucher 21 in said return: $13.10, $32.10, $39.00, & $150 of item $286.75, making the sum of the rejected items $1,411.51, which, taken from $5,552.36, leaves as credit $4,140.85, leaving due the estate July 1st, 1878, $24,330.47.

Increase of liability in the year, $7,529.58.

4th Return. July 1, 1879.

Amount bro't from 3d return		$24,330 47
Am't received since 3d return		6,468 97
Int. on $13,716.64, 1 y'r, to July 1, 1879		960 16
		$31,759 60

CR.

By am't paid out as found in former report, p-. 75 & 76	$11,087 15	
From which deduct	473 32	
Being voucher 22 under exception 13 filed by compl'ts	$10,613 83	
Bal. due estate July 1, 1879		10,613 83
		$21,145 77
Decrease of liability of the adm'r in the year		3,184 70

312 *5th Return. July* 1, 1880.

DR.

Am't from 4th return	$21,145 77
Am't received since last return, $6,563.61, which is to be reduced by two items—$450 on Leake's note & $383.35 as collections on note of W. M. Tumlin, the adm'r being before charged for same	5,730 26
	$26,876 03
Int. on $18,743.46, 1 y'r, to July 1, 1880	1,312 04
	$28,188 07

CR.

By am't paid out, $2,749.74, less 2 items of voucher 29 rejected, to wit, $332 43 & $2,749 74		
15 00	347 43	
$347 43	$2,402 31	2,402 31
		$25,785 76

Liability of the adm'r increased during the year $4,639.99.

6th Return. July 1, 1881.

DR.

Am't from 6th return	$25,785 76
Am't received since 5th return	11,718 56
Int. on $22,661.58, 1 y'r, to July 1, 1881	1,586 31
Am't of Thos. W. Baker's note	78 39
To balance, vouchers 34 & 35	376 22
	$39,545 24

CREDIT.

313 The am't allowed by former report was $3,835.99. By this report the following items are rejected and disallowed, to wit: Voucher 7, $400, and v. 1, $208.69; v. 13, $54.37; v. 33, $6.75; v. 44, $42; in all, $711.81. This from $3,835.99 leaves as credit $3,124 18

Bal. due estate July 1, 1881, as by returns	$36,421 06
Additional charges against the adm'r since last return. (See page after next page for item.)	
Prin.	4,353 90
Int.	511 92
	$41,286 88

Credits allowed adm'r since last return (see 3d page past:)		
Prin.	$2,813 98	
Int.	210 01	
Total	$3,023 99	3,023 99
Bal. due July 1st, 1881		$38,262 89
Int., 1 mo. and 1 day, to Aug. 2, 1881		230 64
Bal., pr. and int., due Aug. 2, 1881		$38,493 53
Am't of prin. and interest due the estate August 2d, 1881, and which is to be compounded annually at 6 per cent. from that date		$38,493 53
Int. at 6 per cent., 1 y'r, to Aug. 2, 1882		2,309 61
		$40,803 14
Int., 1 y'r, to August 2, 1883, at 6 per cent.		2,448 18
Am't due Aug. 2, 1883		$43,251 32
Int. at 6 per cent., 1 y'r, to Aug. 2, 1884		2,595 07
Am't due Aug. 2, 1884		$45,846 39

314 Special master finds it impossible to determine and report the amount which shall on final settlement be due or owing to the heirs of Lewis Tumlin, deceased, because the amount of assets in the hands of the receiver is not yet determined, and because the liabilities of said estate are not yet fixed or ascertained. Some claims against said estate have been submitted to me to audit and report upon, of which I have considered and reported upon; some others are still before me on which I hope to report before the close of the fall term, 1884, of this court.

Respectfully submitted.

Oct. 3, 1884.

E. N. BROYLES,
Special Master.

Additional Items of Charge and Liability of Administrator after and Outside of the Returns.

1. Bal. due on Isham Alley note, prin.		$2,065 56
Int. to July 1, 1881		130 91
2. Bal. due on Border's notes		22 70
3. Bal. due on G. W. Lawrence note, prin.		61 87
Int. to July 1, 1881		10 46
4. Fee in Poole case		200 00
5. Bal. on Poole compromise, prin.		413 00
6. Bal. on Wood note, prin.		222 15
Int. to July 1, 1881		84 40
7. Am't paid Dobbins by Baker & Hall		370 00
Int. from July 1, 1881.		

8.	Bal. on Harris notes, prin.	$ 5 18
	Int. to July 1, 1881	54
9.	Bal. of sale bill made June 10, 1876	160 11
315	Int. to July 1, 1881	52 28
10.	⅓ proceeds sale of Cartersville express	833 33
	Int. from July 1, 1877, to July 1, 1881	233 33
		$4,865 82

See new evidence, 32 Ga., 100 (2).

Of this sum $4,353.90 is principal and the sum of $511.92 is interest.

Credits Allowed the Adm'r, Gray, Outside of the Returns.

1.	Compensation for extra services of 217 days attending to business of the estate out of Bartow county, at $5 per day	$1,085 00
2.	By payment on Augier *fi. fa.* March 26, 1881	916 93
	Int. to July 1, 1881	16 93
3.	Note on L. T. Lyon, date April 9, 1878	75 00
	Int. to July 1, 1881	16 95
4.	Note on L. T. Erwin, due Aug. 1, 1877	300 00
	Int. to July 1, 1881	82 25
5.	Note on G. H. Tumlin, due Nov. 4, 1877	100 00
	Int. to July 1, 1881	25 58
6.	Due bill on same, due April 20, 1877	20 00
	Int. to July 1, 1881	5 86
7.	Due bill on same, due April 7, 1877	20 00
	Int. to July 1, 1881	5 90
8.	Due bill on same, due Feb. 24, 1877	25 00
	Int. to July 1, 1881	7 60
9.	Acc't on same, due April 1, 1877	20 00
	Int. to July 1, 1881	5 95
10.	Note on same, due Dec. 5, 1876	16 25
	Int. on same to July 1, 1881	5 20
316	11. Acc't on same, due March 7, 1876	35 80
	Int. to July 1, 1881	10 84
12.	Note on A. Johnson, due Aug. 28, 1879	100 00
	Int. to July 1, 1881	12 86
13.	Due bill on A. Johnson, due June 26, 1879	100 00
	Int. to July 1, 1881	14 09
		$3,023 99

Of this sum $2,813.98 is prin. and the residue int., to wit, $210.01.

Accounts of the Heirs of Lewis Tumlin, Deceased, with the Estate.

Mrs. Mary L. Spencer's account is the same as in the former report, except as to the cost of the Tumlin monument.

In the former report she was credited with $\frac{6}{7}$ of $600 or $514.79. In this she is credited with $600 principal, thus reducing her liability to the estate, prin. & int., July 1, 1881, to $2,723.05. See former

report, p. 87, and this report on special exception by Mrs. Spencer.

Mrs. Spencer is allowed this credit as between her and the other heirs, but not as against creditors.

Mrs. Lula T. Lyon's account remains — same, except she is chargeable for $100 in reference to certain city lots in Cartersville. See 21 exception filed by Gray and report thereon. This $100 bears interest from Oct. 11, 1875, to wit, $40.05, to July 1, 1881—

Making her liability thus:

	Prin.	$757 84
317	Int. to July 1, 1881	193 85

Ev., p. 859.

Mrs. Lyons claims credit for expenses in prosecuting bill, &c., against the adm'r. This item is not settled yet. The acts of L. T. Erwin, Mrs. Cora M. Gray, and N. B. Tumlin stand same as in former report (see pages 88 & 90), except N. B. Tumlin has additional credit of $333.33, pr., and interest to July 1, 1881, as between — and 21.30 — other heirs. See separate report on the $1,000 claim by said Tumlin and others.

Mrs. Ada S. Rice's account is same as in former report, except she should be further charged with difference between $625 and the price of a certain barouche or carriage given her by Lewis Tumlin in his life, with interest on that difference from Oct. 11, 1875, but she should not, under the evidence, be charged as an advancement with the price of that vehicle, as it appears it was a gift to her and not intended as an advancement.

Her account then should stand thus:

G. H. Tumlin's account is same as in former report (see page 89 thereof), except he is entitled, as between him and the other heirs, to a credit of $333.33 prin. and $21.39 interest, July 1, 1881, being $\frac{1}{3}$ of the $1,000 claim by him and N. B. Tumlin and John S. Leake (see separate report on said claim), thus leaving his indebtedness to the estate July 1, 1881, $795.58.

318 L. T. Erwin and John S. Leake's acc't is same as in former report, p. 90, less a credit of $333.33 prin. & $21.39 int., July 1, 1881, thus leaving due the estate from him July 1, 1881, $488.09.

All which is respectfully submitted.

Oct. 4, 1884.

E. N. BROYLES,
Special Master.

The special master has heard and reported upon and allowed as against the estate of Lewis Tumlin, deceased, the following claims, to wit, all which claims accompany this report and have separate reports on each :

1.	Claim of D. P. Hill	$213 75
2.	" " Mrs. M. R. Akerman, ex	450 00
3.	" " F. M. Martin & wife	420 00
4.	" " Thos. Stephens	23 25
5.	" " John W. Akin	203 08

This includes the $40 allowed Akin & Akin in former report, p. 85.

6. Planters' and Miners' Bank, 2 *fi. fas.* with 10 per cent. off leaves on both, prin.	201 75
Int. to Nov. 2, 1884	109 46
Costs	11 25
7. Claim of M. G. Dobbins on Stephenson Knight's *fi. fas.*, prin.	1,333 38
Int. to Sept. 24, 1844	868 52

See separate report.

319 *Amounts for Which the Several Sets of Sureties are, Respectively, Liable.*

Three of the sureties on the joint bond of Gray and Erwin are not bound at all for any sum. See report on that question herewith filed. See on this general point former report, items 39 and 40 and 88.

Gray and the bondsmen of Gray and Erwin, on their joint bond, made August 2, 1876, are liable solely for the sum of $6,831.68, as principal sum, July 1, 1881, and interest thereon at 7 per cent. per annum to August 2, 1881, $12.03; and from August 2, 1881, at rate of 6 per cent. interest, compounded annually to Nov. 2, 1884, making prin. & int. to August 2, 1884, $8,139.46; and interest at rate of 6 per cent. per annum from Aug. 2, 1884, to Nov. 2, 1884, is

	$122 09
Prin.	8,186 70
Int. to Nov. 2, 1884	122 80

Liability of Sureties on Subsequent Bonds Given by Gray Alone.

I find the bondsmen on bond given May 2d, 1876, and which was superseded by bond given Oct. 13, 1877 (see items 13 & 20 of former report), are liable as follows:

Principal sum July 1, 1881	$12,351 49
Int. at 7 per cent. to Aug. 2, 1881	74 45
	$12,425 94
This compounded at 6 per cent. annually to Aug. 2, 1884, is	14,799 48
Int. at rate 6 per cent. to Nov. 2, 1884, 3 mos., is	221 99

320 See former report, p. 81.

Liability of makers of 3d bond, dated Oct. 13, 1877, and superseded by bond made May 6, 1878. See item- 20 & —, page 82 of former report.

Principal sum to July 1, 1881	$16,401 99
Int. to Aug. 2, 1881	98 95
	$16,500 94
This, compounded at 6 per cent.—3 y'rs—to Aug. 2, 1884, is	$19,652 88
Int. at 6 per cent. to Nov. 2, 1884	294 79

For a part of the above sum, to wit, $14,799.48, prin. & int. to Aug. 2, 1884, & $221 interest to Nov. 2, 1884, the sureties on this bond are concurrently liable with the sureties on the former bond given May 2, 1876.

The sureties on the last bond given by Gray, adm'r, to wit, May 6, 1878, are — for all waste and default of Gray as adm'r.

Subsequent to Erwin's discharge, to wit, to Aug. 2, 1884, prin. & int., $37,659.69. Prin. Aug. 2, 1881, is $31,619.82; int. at 6 per cent. to Nov. 2, 1884, 564.89.

The liability on this bond covers all the liability in former bond and $15,118.88, due to Aug. 2, 1881, and compounded annually thereafter at rate 6 per cent. to Aug. 2, 1884.

The sureties on Gray and Erwin's bond, except the three who are held not bound, are liable concurrently with the sureties on
321 each of the other bonds for same amounts, respectively.

Respectfully submitted.

Oct. 3, 1884.

E. N. BROYLES,
Special Master.

Filed in clerk's office Oct. 4, 1884.

A. E. BUCK, *Clerk.*

322 *Report on Exceptions Filed by Complainants.*

Exceptions 1, 2, 3, & 4 complain that the administrator is allowed commissions for the years ending July 1, 1877, July 1, 1878, July 1, 1879, and July 1, 1881.

In support of these exceptions reference is made to the said report as showing, 1st, that the adm'r did not file his returns for said years by July 1 each year and not until after said date. Complainants contend that the orders obtained by the adm'r from the court of ordinary did not relieve the forfeiture of commissions, as such orders were granted each year before July 1 and not after that date.

2d. That the returns made by the adm'r, as shown by said report, were not according to law; that they did not contain a true and just account of the receipts and expenditures.

The return for the year ending July 1, 1878, was made Sept. 2, 1878, and no order from the probate court is shown giving further time to make return or relieving from forfeiture of commissions.

Under the facts of the case, I do not think the delay in making the annual returns, as shown in this case, ought to work a forfeiture of commissions.

See item 33 of original report; code, 2596.

This section seems to apply only in cases where no return
323 was made and not when the return was delayed.

But the other point in the exceptions, in connection with the facts and under direction 4th of the order of recommittal, is well taken, and defeats the adm'r's claim for commissions on all the returns.

It appears that Gray and Erwin during their joint administration, and Gray afterwards, made collections of money which were

never returned at all, and in other instances not in the next or even 2 returns.

See report on Gray's 8 exception, as to items—$100 collected Feb. 25, 1876, $100 collected March 20, 1876, and $200 collected June 1, 1876; not returned till 1880. Mr. Gray collected from Hudgins as follows: To July 1, 1876, $70; for next year, to July, 1877, $50; for next year, to July, 1878, $381.18; for next year, to July, 1879, $160.

The return of 1879 contains the first account of collections from Hudgins, to wit, $125, as having been collected April 4, 1879. Return of 1880 has $41.50 collected from Hudgins August 1, 1879, and $50 collected of him July 14, 1879. The return of 1881 has, from Hudgins, collected Oct. 13, 1880, $1,250 & int. on same—$1,494.77. These are the returns of collections on Hudgins' claim.

See reports and evidence by Hudgins taken since former report and which accompany this report.

As shown by return of 1880, on Oct. 13, 1877, Gray col-
324 lected $450 from John S. Leake and not returned till 1880.

Gray collected note on W. W. Rich & Bro., $238, and made no return of it at all; date of collection not shown, but note was due Dec'r 25, 1875. See former report, p. 73. See same page as to items—$50 Bishop note, $52.36 on W. C. Baker note, $80 on Goodman note, and other items; none of these items were returned, and dates of collections not shown, though claims due, most, if not all, before death of Tumlin. On Sept. 28, 1877, Gray collected from W. M. Gilbert $180.46, which he did not account for in any of his returns. See Ev., p. 207.

On Feb. 5, 1878, Gray collected $100 on note of N. J. Tumlin and made no return of same at all.

See item 79 in Exhibit K to former report and page 74 of said report.

5 exception by complainants, as to discharge of Erwin as adm'r. This exception is not sustained. I adhere to former findings on this point. The finding then made is further supported by judgment *nunc pro tunc* on the verdict rendered in Bartow superior court on appeal. See record of same attached to exceptions filed by sureties on bond of Gray and Erwin which accompanies this report. The order granting said judgment *nunc pro tunc* has been appealed from and is now pending in the supreme court of the State.

325 6 exception by compl'ts, relating to item 60 of the former report, to wit, sale of the Clayton land. Since said report was made further evidence has been taken, which is attached as Exhibit "A" to this report. This evidence shows that Lewis Tumlin sold the land to Clayton, took his notes for the purchase-money, and gave bond to make him title when purchase-moneys hould be paid. Clayton failed to pay for the land and Gray and Erwin, adm'rs of Lewis Tumlin, sued the notes to judgment against Clayton, and Gray, adm'r, had *fi. fa.* issued and levied on said property and property sold and bought in by N. S. Eaves for Mrs. Gray, and Mrs. Gray sold it to Mrs. Elizabeth B. Leake, Oct. 21, 1880. Neither Lewis Tumlin in his life nor his adm'r after his death made and

the order of recommittal in this case. Ev., pp. 19 or 195, 196, 197, had recorded, as required by law, a deed for said land to Clayton before said *fi. fa.* was levied on said land.

Under this state of facts I am of the opinion and so report that said sale of the Clayton land by the sh'ff to Mr. Eaves was null and void and passed no title, and that the deed by Eaves to Mrs. Gray passed no title to her.

Code, 3654; 22 Ga., 116; 48 Ga., 394; 47 Ga., 214; 62 Ga., 528(5).

Said lands at date of sheriff's sale, Nov. 1, 1876, were worth $1,000. Said *fi. fa.* was issued August 22, 1876. The last official entry on said *fi. fa.* is dated Nov. 16, 1876. Thus, it would seem that the judgment deeds *fi. fa.* are dormant.

326 Mrs. Leake has been in possession of the land more than seven years, by connecting her possession with that of Mrs. Gray, since Nov. 1, 1876. Tumlin's estate, under the facts, has the right to hold the adm'r liable for the value of the land and interest or to enforce said judgment and *fi. fa.* against said land. In attempting the latter Mrs. Leak might make successful resistance, and on the whole I charge Mr. Gray with $1,000 and interest from Nov. 1, 1876, as the value of the land at date of sale.

7th exception by complainants relates to notes pledged by adm'r in hands of Akin & Akin.

As it seems that the question involved in this exception had not, as surmised in former report, been decided and settled by his honor, the circuit judge, I sustain said exception and find and report that the receiver is entitled to said notes, and that the adm'r had no legal right to turn them over as collaterals to said att'ys to secure the Augier *fi. fa.* held by John Neal.

Code, 2535, 2555, 2556, 2560, 2666, 2569.

Neal vs. Tumlin and Gray, Adm'r, as Surety.

8th and 11th exceptions, relating to the claim of John Neal *vs.* Thomas Tumlin & Gray, adm'r of Lewis Tumlin, surety.

See former report, items 53, 54, 55, on pages 40 to 46. See also evidence, Book B, pages 497, 498, 499, 503, 504, 551; Book D, p. 856, 857. See also written consent by Gray, adm'r, dated June 7,

327 1879, attached to this report and marked Exhibit B; also written consent of Gray, adm'r, dated Feb. 7, 1880, attached to this report and marked Exhibit C.

Said Exhibit B shows the written consent of Gray, adm'r, that the case stands without judgment till January term, 1880. This writing is dated Feb. 7, 1879. There is in it an express consent *the* Neal may take judgment before January term, 1880, if he sees proper to do so. This Exhibit B refers to a letter by Neal to Thomas Tumlin, dated January 22, 1878, proposing to allow the balance on the note to remain unpaid and drawing 12 per cent. net interest from that date if Gray, adm'r, would consent. That letter is not in evidence, and exactly what were the terms of that letter and what were the terms of the contract to which Gray gave his consent as adm'r does not appear with certainty; but from all the evidence I find that in February, or perhaps in January, 1879,

Neal, by Gray's consent, as adm'r, promised Thomas Tumlin not to press the case for trial and not to take judgment until January term, 1880, on said Thomas Tumlin's promising them to pay the interest on said claim and 12 per cent. interest—that is, to pay said interest that should be due Jan'ry term, 1880. Neal waited, as he agreed to do, and then at Jan'y term, 1880, took judgment soon after that, to wit, on Feb'y 7, 1880. Thomas Tumlin paid
328 Neal the said interest; but when said interest was paid Exhibit "C" was given and the interest reduced from 12 to 10 per cent., and Neal gave one more year's time. Now, the only consideration that moved to Neal under both said arrangements for time was the payment by the debtor of interest *passed* due, which was no valid consideration to support any promise to give time, and the surety could not thereby be discharged, even if he or his adm'r had not consented.

The agreement made by Gray, adm'r, June 17, 1881, was that he then paid $252.92 & costs, being the int. that would be due Nov. 1, 1881, with the understanding that Neal was not bound to wait or give time till Nov. 1, but could proceed at once with the *fi. fa.*, and in case he did so said payment was to be considered as made on said *fi. fa.* of date June,7, 1881. See former report, item 53; also evidence of T. W. Akin, Book B, p. 498. Therefore the evidence does not show any binding contract between Neal and Thomas Tumlin, the principal debtor, to give him time on said claim.

The evidence further shows that Gray, adm'r, expressly agreed to all that was done in reference to giving time, &c.

33 Ga., 173; 2 Am. L. C., top p. 390, 461, 464; 3 Lead Co.'s Equi., top p. 550, 551, 560, 563; Brandt on Suretyship, S. 296. Hence I find the surety not discharged and do not sustain said exceptions.

329 9 exception. No evidence or reason has been shown sufficient to sustain this exception—the allowing of Gray $5 a day as extra compensation for 244 days engaged out of the county of Bartow. See former report and, Code, 2593, with this exception:

It appears that of the said 244 days some 27 of them were embraced in the time Gray was engaged in and about the negro witnesses in Tennessee. Ev., p. 777 & 778. All compensation for said 27 days, under 7 direction in the order of recommittal, is rejected and disallowed, leaving $1,085 for 217 days.

10 exception by complainants, to effect that interest should have been collected and charged against the adm'r at rate of 7 per cent. per annum till August 2, 1881, and after that at 6 per cent. and compounded annually, seems, under Code, 2603, & 3d direction in said recommittal order, well founded, and is sustained.

12 exception by complainants. This exception is sustained in all its points, except as to voucher No. 2, and is sustained as to $\frac{1}{3}$ of that, so as to allow the adm'r credit for 66.66 instead of $100, the residue, showing that said voucher was for other expenses, to about $\frac{2}{3}$ of it, besides the expenses to Tennessee in regard to the
330 negroes' evidence. The evidence brings the matters in this exception, except said $\frac{2}{3}$ of voucher 2, under the 7 clause of

198, 200, 777, 778, 915, 916, 671 to 674, 678 and 679, 680 to 688, 932 to 934, 639, 640 to 642, 647 to 649, 650 to 652, 377, 378, 371, 836.

13 exception by complainants, relating to fees of Stansell and Wofford, is sustained in part and overruled in part under the 8 item in said order of recommittal and the evidence. The evidence shows an agreement between Gray and said att'ys, made in Feb., 1877, to the effect, in substance, that in all cases not litigated in which the Tumlin estate was interested and Stansell and Wofford employed as attorneys for said estate Gray was to have half of the fees. Ev., p-. 41, 46, 296. The exception is sustained as to voucher 44 in return of 1877, as the evidence does not show what said sum was paid for nor whether Gray had an interest in said sum. Ev., p-. 57, 58, 59, 194.

As to vouchers 4, 17, 23, 37, 39, 44, 61, 69, 76, 78, 86, 91, 97, 100, and 106 in return for 1878, being all embraced in one voucher, the exception is sustained as to said vouchers 4, 76, 78, 91, 100, and 106 but overruled as to said vouchers 17, 23, 37, 39, 44, 61, 69, 86, and 97 under the evidence and said item 8 of said order of recommittal. Ev., pp. 46, 50, 198, 41 to 50, 602 to 604, 657 to 659, 194, 296, 297.

331 The exception is sustained as to voucher 22 in return of 1879, as the evidence fails to show how much of that sum was for services in matters in which Gray had no interest. Ev., 45, & see voucher 22, Ev., 48, 49.

The exception is sustained as to the following items in voucher 29, of return of 1880, to wit, $3,324.39 on Harris' note and $15.00 on manganese matter, but not sustained as to item $9.05; $65 fee in F. M. Martin case, $130 in insurance cases. Ev., 45 & 46, 48, 49, 850.

This exception, so far as it relates to vouchers 1, 13, 27, 33, 41, and 44, aggregating $636.81, in return of 1881, is sustained in part and overruled in part, as follows: It is sustained as to items in vouchers No. 1, $208.69; No. 13, $54.37; No. 33, $6.75; No. 44, $42.00; and it is overruled as to vouchers No. 27, $200; No. 41, $125. Ev., p-. 45, 46, 47.

All the items to which this exception is thus sustained aggregates the principal sum of $1,849.74, of which sum $50 is on voucher in return of 1877, $667.18 on vouchers in return of 1878, $473.32 in return of 1879, $347.43 in return of 1880, and $311.81 in return of 1881.

I find also that the said attorneys divided their fee with Gray in the Poole case; that fee was $200, and Gray received $66.66 of that; whether Gray, as adm'r, has claimed and obtained credit in

332 his returns for that sum of $200 as paid out the evidence does not seem to show. It is fair to presume he has done so, and in that case I suppose I find under the order of recommittal to me that Mr. Gray should be charged with that $200.

NOTE.—Mr. Gray's testimony is to the effect that he himself actually received, under the arrangement to divide commissions aforesaid, the sum of $289, and Mr. A. P. Wofford, who dealt with Gray and made the contract with him, says Gray received from $300 to

$400, say $350, *binds* $66.66 of the $200 fee in the Poole case. These two witnesses are the only ones who knew much about it, and their knowledge seems quite indefinite, except that of Mr. Gray's, as to the actual general amount received. Ev., 41 to 50, 602 to 604, 657 to 659, 190, 296, 297.

14th exception by complainants is sustained as to item $52, voucher 55, in return of 1877, because it is expenses incurred in relation to evidence of the negro Oglesby. See voucher 55, & item 7, in order of recommittal. Ev., 191, 192.

As to the other items in said voucher No. 4, the exception is not sustained but overruled.

As to voucher No. 21, in relation of 1878, the exception is sustained as to the following items, $13.10, $32.10, and $39.00, for same reason as above, and as to $150 of item $286.75, this $150
333 being that paid to C. B. Wellborn; the payment of said sum to Wellborn does not seem to be justified by the facts in evidence and under said 7th item in said recommittal order.

As to the other items in said voucher No. 21, and $136.75 of said item $286.75, said exception is overruled. Ev., 138, 139, 220, 836.

This exception is overruled as to vouchers 184 in return of 1880. Ev., 851 & 852.

See also as to vouchers 2, 3, & 14 in return of 1881. Ev., 852.

This 14 exception is thus sustained to $52 in return of 1877 and $234.20 in return of 1878; total, $286.20, principal sum, and is overruled as to all the other items in the exception.

15th exception by complainants is sustained, though on the former hearing before me Mrs. Spencer claimed a credit for only $\frac{6}{7}$ of the $600 which, in the former report, was allowed her. See separate report on her exception.

16, 17, 18, 19, and 20 exception- by complainants are each and all overruled except as follows: These exceptions are all based on the contention that the administrator ought to be charged interest on the whole amount of funds shown to be in his hands by his return from the date of the return, and none of that sum should be exempt from bearing interest, if during the year succeeding
334 the return the administrators collects in enough to meet the current expenditures.

I do not find this to be the legal rule. Owing to the uncertainty of making collections the adm'r could not safely rely on such collections to pay the current expenditures, and hence should retain in his hands enough ready money to meet such expenditures, and whilst retaining these funds he could make no interest on the same, and therefore should not be charged with interest.

Code, 2602, (3, 4).

29 Ga., 103, (12).

But said exceptions are sustained each as follows and under this view: Under said paragraph 4 of said section 2602 the adm'r should be charged interest on the balance left in his hands at the beginning of the year, after deducting the expenditures for such year, the same to be computed and ascertained on final settlement. This rule being

carried out will increase the interest-bearing funds for each of the years to the returns of which said exceptions apply.

It is deemed useless here to set out in detail the effect of this rule, as the actual amounts of credits and debts in said returns will be different in this report from the amounts in the original report, not only from the effect of this rule, but for other causes. At a later stage in this report all this will be shown.

21st exception by complainants. This exception is sus-
335 tained in part—that is, I find said sum should be $780.87 instead of $750.34, but not $880.87, as claimed. The $100 item, being voucher 8 in 2d return and disallowed to adm'r as credit, ought not and was not added to the items of debt, but was deducted from the adm'r's claim of credits, as it should have been.

22d exception by complainants is not sustained. Code, 25, 89 & 25, 95. The fact, if true, — it was no trouble to the administrators to get possession of the money, is no legal reason for not having a right to the commissions. Many claims due on estate may be paid without trouble to the adm'r, and many sums may be paid out without trouble. Still, the adm'r is entitled to commissions. Ev., p. 149, 156, 157.

23d exception by compl'ts is sustained in part. The facts are as follows: The note on G. W. Lawrence was for $400, dated Dec. 30, 1872, due June 1, 1874. Credits: Jan'y 23, 1874, $180; Feb'y 2, 1878, $160; Jan'y 31, 1879, $60, leaving due then $61.87, and interest on this to July 1, 1881, is $10.46.

Prin.	$61 87
Int. to July 1, 1881	10 46

Ev., 663, 880 to 883.

24 exception by complainants is sustained, & the administrator Gray is to be charged with $4.13 principal, with interest thereon from August 1st, 1881. Ev., 112, 113, 215, 802, 803.

336 25 exception by complainants is sustained substantially. S. S. Stephens' note. Facts: Note for $1,640.42, due Nov. 1, 1874; bears 7 per cent. interest. Credits: Sept. 4, 1877, $1,000.00; Dec'r 29, '77, $565; January 1, 1878, $75 and $250, leaving due at last payment $98.28; interest on same to July 1, 1881, $24.07.

Prin.	$98 28
Int. to July 1, 1881	24 07

Ev., p. 805.

26 exception by complainants is substantially sustained. The claim is founded on a note given by W. H. Wood, dated Dec'r 1, 1874, due Jan'y 1, 1876, for $1,750 principal, bearing interest at (1) one per cent. per month, the interest payable semi-annually from date. Credits: March 25, 1878, $985.25; July 22, 1878, $1,368.03. I consider the instalments of interest each bears interest at 7 per cent. from time it fell due and I have so counted it. I find still unaccounted for on said note July 1, 1881—

Principal sum	$222 15
Int.	84 40

See 61 Ga., 275.

If interest be not calculated as aforesaid on the interest the balance due on said note is as follows, July 1, 1881:

Prin.	$148 74
Int.	52 59

Ev., 163.

337 27 exception by complainants is overruled. In fact, complainants abandoned said exception in the hearing before me.

28th exception by complainants is sustained and said items of credit disallowed for reasons stated in the exception.

29th exception by complainants, as to voucher No. 40 in return of 1881 for $252.92 paid on the Neal *fi. fa.*, is overruled for reasons given in overruling the 8 exception of complainants. See that exception and report on it *ante*.

30th exception by complainants is sustained, and the adm'r Gray is charged with the sum of $370, principal, July 1, 1881, received from Dobbins on the Baker & Hall note given by them on compromise of the Gower claim. Ev., p-. 3, 181, 182, 183, 184, 400, 401, & 402. See item 78 in former report. Ev., 185, 186.

31st exception by complainants not sustained. The copy of the return of 1876, which complainants had and used, had omitted a $1,000 item on the credit side, which mislead them — caused *to* exception to be filed. See the original return.

This exception, I believe, was also abandoned on rehearing before me.

32 exception by complainants as to collections on note of $6,000 on J. W. & C. W. Harris. This is matter of calculation. The
338 note is for $6,000, due Jan'y 1, 1873. The note bore 7 per cent. Ev., p. 147.

Credits.

January	17, 1873	$1,400 00
"	3, 1874	200 00
Oct.	6, "	200 00
January	5, 1875	400 00
"	20, "	637 55
"	7, 1876	650 00
Nov.	1, 1877	700 00
Feb.	6, 1878	300 00
Aug.	5, 1879	270 00
January	1, 1880	3,054 39

At date of this last payment I find there was due on said note $3,059.57 on the small sum of $5.18 more than was paid. That sum is still due, with interest thereon from said date.

Prin.	$5 18
Int. to July 1, 1881	54

But in his return of 1880, the adm'r Gray returns, as interest collected on said note, the sum of $1,804.94, when, in fact, the adm'rs

collected on said note only $1,150.25, as interest, the residue being principal.

The adm'rs seems to have regarded all payments as going first to discharge the principal & *and* then the residue to go to pay interest. This is wrong, but immaterial, as the Harris note was not for loaned money, but was for land.

33 & 35 exceptions by complainants relate to the same
339 thing, and are well taken and sustained in part.

On June 10, 1876, Gray, adm'r, sold personal property which brought $616.11, to become due Nov. 1, 1876. The adm'r appears to have accounted for in his returns only $74.25, as shown in 35 exception, and, of course, is chargeable with $541.11, less the 3 notes mentioned in exception 35. These 3 notes aggregate $381.75, which leaves $160.11, for which said Gray is chargeable, with interest from Nov. 1, 1876; int. to July 1, 1881, $52.28; and the 3 notes aforesaid should not go as credit to the adm'r as is given on page 80 of the former report. Ev., 808, 809, 901, & 902; also sale bill of June 10, 1876.

34th exception of complainants relating to note on Thos. H. Baker is sustained in part. The note was put in suit; an offset was pleaded; judg't went in favor of pl'ff July 27, 1877, for $130.62 prin. & $6.17 interest. On May 26, 1881, is a credit of $93.95, leaving balance of $77.87.

Prin.	$77 87
Int. 1 mo. & 5 days, to July 1, 1881	52

See declaration, plea, note, and return of 1881. Ev., 796, 797, 879.

35 exception by complainants is substantially sustained.
340 After careful consideration I think and report that the adm'r had no legal right to make the arrangement with Dobbins, and that the payments made to Dobbins should go as credits, as claimed on the said *fi. fas.* held by Dobbins, and in auditing the said *fi. fas.* and fixing the amount due thereon I have treated said sums as partial payments. For the facts see former report, items 47, 48, & 49.

On rehearing of the case ten other matters were considered and passed upon, to wit, a claim of credit by the adm'r of $400, as shown in voucher 7 of the return of 1881, and the sale of the newspaper and materials called the Cartersville Express. Additional evidence was introduced on both these points, which was taken down by the special master and it is sent up with this report.

I find and report that the adm'r is not entitled to credit for said voucher 7 and reject it. See separate report on that voucher.

I also find that Lewis Tumlin's estate had ⅓ interest in that newspaper, its material, &c., and that the adm'r Gray & the other or some of the other owners sold the same at private sale for $2,500 on credit and took notes of Willingham, the purchaser, with security for the purchase-money. The evidence is conflicting as
341 to the actual value of the property at the time. The evidence also shows that the purchase-money was not paid by Willing-

ham or his securities. As it was illegal for the adm'r to sell at private sale and as the evidence conflicts as to the value, I think the adm'r should be held to account for ⅔ of the property at its sale price, and I have so charged him, with interest thereon since July 1, 1884.

Oct. 1, 1884.

E. N. BROYLES,
Special Master.

Filed in clerk's office Oct. 4, 1884.

A. E. BUCK, *Clerk.*

342 The evidence shows that J. G. B. Erwin & H. C. Erwin were relatives of John A. Erwin, one of the administrators, and L. R. Ramsouer was his brother-in-law; H. C. Ramsouer was — son of L. R. Ramsouer and partner in trade with J. A. Erwin; said J. G. B. Erwin & H. C. Erwin and L. R. Ramsouer, knowing that J. A. Erwin and F. P. Gray were about administering on the estate of Lewis Tumlin, deceased, each executed a power of attorney, thereby authorizing said H. C. Ramsouer to sign his name as security on a bond to be given by J. A. Erwin, as one of the administrators on the estate of Lewis Tumlin, &c. After these powers of att'y were made and delivered to H. C. Ramsouer, John A. Erwin changed each of them so as to read, "To sign my name as security on a bond to be given by J. A. Erwin and F. P. Gray, administrators on the estate," &c. This change was made without the consent or knowledge of either of the makers of said powers of attorney, and they insist th-y had no notice or knowledge of such change until about Sept. 10, 1883, though in this suit a copy of said bond was attached as exhibit, and this was commenced *in* July 12, 1881.

In Dec'r, 1880, Mrs. Lula T. Lyon filed her bill in Bartow sup'r court against Frank P. Gray, Cora M. Gray, and all the sureties of Gray and Erwin's bond and others, and among the exhibits to said bill was a copy of said bond of Gray and Erwin's. True copies of said bill were served on Henry C. Ramsouer, J. G. B. Erwin,
343 & Henry C. Erwin and others in due time and in answer to X int'ys.

J. G. B. Erwin and Henry C. Erwin admit that in Dec'r, 1880, or January, 1881, they read said bill and the copy of Gray and Erwin's bond attached as exhibit.

These Erwins also admit that they knew or were informed that Gray and Erwin had jointly administered on Tumlin's estate John A. Erwin testifies that he made the alterations without the knowledge or consent of the sureties; that the makers of said powers were informed by him before they signed said powers that Gray was to be his co-administrator.

In view of the foregoing facts H. C. Erwin — J. G. B. Erwin insist and urge as defense that they never agreed to become sureties on the joint bond of Gray and Erwin, and that in signing their names to such bond their agent, H. C. Ramsouer, acted without authority, and that therefore they are not bound as sureties on said bond and never were bound. H. C. Ramsouer, as the administrator of L. R. Ramsouer, makes a like contention and defense.

The special master finds and reports that said three sureties, respectively, authorized and empowered their att'y-in-fact, H. C. Ramsouer, to sign their names only to a bond to be given by John
344 A. Erwin, as one of the administrators, and not to a joint bond given by Grey and Erwin, and that in signing their names to said joint bond said attorney transcended the express authority given to him, and his act in so doing was void and not binding on either of said three sureties.

Counsel for the receiver contend that administration on said estate was, in law, a unit, and but one bond could have been given, and therefore said powers of attorney authorized the signing of their names to that bond; that, as none but a joint bond could be given, the power was nugatory, unless it applied to and authorized the execution of the joint bond; but the liability of the surety is one of strict law and will not be extended beyond his express agreement. It will not be enlarged by implication.

The special master also reports and finds that neither of said three sureties are shown to have ratified the act of their agent in signing their names to said bond. Nothing short of a writing under their hands and seals to that effect would amount to a ratification—and it is not pretended this was done. Code of Ga., 2182, 55 Ga., 46; 30 Ga., 278; Wharton on Agents & Agency S. S., 83.

The said three sureties each, in Dec'r, 1880, or in Jan'y, 1881, had knowledge, or ought to have known by reason of the copy of the said joint bond served on them, that their names had been signed by their said agent to said joint bond, and they each remained silent and inactive in regard to the same until some time in Sept.,
345 1883, when they learned they were about to be made liable on said bond, and the adm'r Gray was allowed to go on with the administration till July 12, 1881—some six months after these sureties had notice of the improper signing of their names to said joint bond. Do such knowledge and silence, under the circumstances, estopp these sureties now from denying their liability on said bond? These facts at most show a tacit admission that their names were properly signed to said bond. In the absence of any countervailing proof such evidence might be sufficient to establish the fact, but there is contradictory evidence and evidence which shows conclusively that they never gave authority to so sign their names.

An admission of a fact is not conclusive on the party so as to work an estoppel, unless it induced another, with whom the party making the admission was dealing or contracting, to pursue a line of conduct injurious to his interest, if the admission be not binding.

In this case the evidence does not show that any person, either the ordinary of Bartow county, the heirs of Tumlin, or his creditors, from Dec'r, 1880, to July, 1881, or at any time since, relied upon or acted upon the opinion or belief that these three sureties or either of them were liable on said joint bond, but, on the contrary, all persons concerned seemed to regard not only these three, but all the sureties on said bond, as having been discharged in 1876,
346 when John A. Erwin resigned. From that time forward the

ordinary of the county and the parties at interest seemed to rely on the new bonds and sureties afterwards given by Gray. If, in Dec'r, 1880, or Jan'y, 1881, said three sureties had made publicly known to any person that they had never authorized their names to be signed to such a bond, it is not perceived that such publication could or would have in any material respect produced any different action or course of conduct by any of the parties at interest from that which has been actually had. No person has been hurt or misled to their injury by such silence. Hence there is no estoppel as to the liability on said bond of the other sureties, since said three are not bound by it and never were.

W. I. Benham, R. L. Rogers, A. C. Trimble, A. W. Mitchell, J. M. Veach, and J. J. Howard, sureties on said joint bond of Gray and Erwin, insist that as three of their co-sureties are not liable on the bond, and as they signed the bond on the faith and belief that said three were liable jointly with them, these—the said Benham and others—are not liable on said bond. The question here is not whether an alteration of the contract without the sureties' consent would discharge him. There was no alteration. Said three sureties never were parties to said bond, and so declaring does not alter the contract; neither is the question of the effect of the release of one
347 joint debtor as to the liability of another involved. As these three sureties were never bound there could have been no release.

The question here is, there being no charge of fraud or evidence thereof, What effect on the binding force of the bond will it have where the surety believes, and acts upon that belief, that certain other signatures to the bond are valid and binding when, in fact, said signatures are not binding? If, in fact, the surety is mistaken and the signatures which he believed valid are not in fact so, whose fault is it? Who shall bear the loss, if any, resulting from such mistake. The surety himself must, unless he was misled by some one in whom he had the right to trust and rely upon.

It is the surety's duty to see for himself that the signatures of his co-sureties are binding on them, if he intends to rely upon their being bound. In this case these sureties could easily have ascertained the extent of the powers of att'y under which H. C. Ramsouer acted, and they are properly charged with knowledge of the same and of signing the bond with such knowledge and of assuming the risk incident to the actual facts of the case.

Brandt on Surety and Guaranty, sect. 358; 39 Maine, 541; 2 Heads (Penn.), 613; 64 Mo., 167.

It was the duty of the ordinary of Bartow county, in taking the bond, to examine the powers of attorney under which H. C. Ramsouer assumed to act in signing the names of his principals
348 to said bonds, but that did not relieve the surety from duty to do so. The ordinary was the agent of the law, and it was his duty to see that valid signatures were made to the bond in order to protect the interest of Tumlin's estate, but it was not his duty to protect any one as surety on the bond. If it was, then it would be his duty to get as many sureties on the bond as possible, in order

to lighten the possible responsibility of each, whereas he is only required to take good security and enough of names to make the bond good. His business is to get such a bond as will protect the interest of the estate. He is on one side and the adm'r and his sureties on the other. It is not his duty to protect or take care of the surety. Of course, he must act in good faith and be guilty of no fraud or concealment. None of this is charged on the ordinary in this case. The ordinary did not know of the defect in the powers of attorney at the time the sureties signed the bond. If the ordinary failed to do his duty in this case and took a bond with insufficient sureties by reason of his neglect to examine into said powers of attorney, he has made himself liable to Tumlin's estate, but not to the surety. Who ever heard of one surety suing the ordinary because another who was apparently bound on the bond was not so bound?

349 The conclusion is that the non-liability of said three persons on said bond is no good reason in law for declaring the others not liable.

Respectfully submitted.

E. N. BROYLES,
Special Master.

Filed in clerk's office Oct. 4, 1884.

A. E. BUCK, *Clerk.*

350 *Report upon the Exceptions Filed by F. P. Gray to Former Report of the Special Master in this Case.*

Exception No. 1 by Gray is overruled; no new evidence has been introduced on this subject since the 1st report. See item 36 of said report.

True that the approval of the probate judge makes the return *prima facie* correct unless the return is illegal or fraudulent on its face, but in this case the evidence, I think, changes the burden of proof. It shows that all the interest collected was not for loaned money. Mr. Gray claims 10 per cent. on all said interest collected. Under the law and the evidence, he is not entitled to it. His claim is not legal as a whole, and as a whole cannot be sustained. Can it be sustained as to part; if so, to what part? It seems to me, to only such part as the evidence under the law shows him entitled to. Code, 2525, 2590; 32 Ga., 81, 101, 102, 103; 54 Ga., 180; 60 Ga., 316; 61 Ga., 452.

2nd exception by def't Gray is not sustained, but overruled.

Since former report no new evidence has been introduced.

The evidence does not show that the question of the proper compensation to the adm'rs for division of said land was submitted
351 to or passed upon by the jury or made the judgment of the court, as claimed in said exception.

The judgment of the court of ordinary did not pretend to decide that Erwin had not committed waste or become liable for his conduct, but expressly provides that he is discharged from future liability, but not past liability (page 13 of original report, and Exhibit N to same); and the judgment on the appeal in the supreme court

of Bartow county, rendered *nunc pro tunc*, is to the same effect, and is not *res judicata* as to the commissioner. 49 Ga., 412 (2); 19 Ga., 413.

3rd exception filed by Gray. This exception is overruled in all its parts. No new evidence has been introduced since making the original report. The exception is clearly not to be sustained. See original report, items 56 & 57. This exception relates to the Augier *fi. fa.* and John Neal's control of it.

4th exception by Gray as to the Gilreath note. I see no reason for entertaining this exception and therefore overrule it. See item 67 of former report & citations therein.

5th exception by Gray is not sustained. The evidence and
352 several close calculations made show that Gray has no ground to complain. The truth is, taking the return as made by Mr. Gray and the other evidence, on the 23 Oct., 1880, date he returned as collected $1,306.21, there was then due on said notes $1,665.16, leaving still unaccounted for $358.95, but on same date and return were these three items, written thus:

"Oct. 24 (1880). To Randolph Borden	$1,306 21
" " " " A. R. Hudgins	1,250 00
" " " " int. on do.	1,494 77"

By close calculation I found that those items and others in the returns showed Hudgins' claim overpaid by $337.36 Supposing that do. above might relate to both the Borden and Hudgins claims, I applied said sum of $337.31 on the Borden note, which left $21.59 Oct. 23, 1880.

6th exception by Gray is sustained in part. On going over the calculation carefully I find there was due still and unaccounted for in the returns—

July 1, 1881. Prin.	$2,065 56
Int.	130 91

Tumlin's estate held two notes on Allen.

One due April 6, '73, for $2,000; credit, Sept. 11, 1873, of $644.37. Int. paid to March 25, 1875.

One other, due April 3, '72; int. paid to April 3, 1875, and in addition the following credits: July 18, '76, $50; Sept. 29, '76,
353 $100; Oct. 9, '76, $5; Oct. 18, '76, $500; Nov. 14, 1876, $300; Dec. 11, 1876, $150; Aug. 5, 1880, $2,000.

7th exception by Gray is based on a mistake of fact. Whilst the item of $240 in that report is charged up against the adm'rs it was also counted to their credit on the credit side of the report state—p. 72 of report.

8th exception by Gray, item 87 of Exhibit K to former report, that item being a copy of the $2,200 note on W. N. Tumlin and the credits thereon, shows the following payments or credits on said note after death of Lewis Tumblin:

Oct. 16, 1875	199 50
Nov. 21, 1875	199 50
Dec. 21, 1875	240 00

Feb. 25, 1876	100 00
M'ch 20, 1876	100 00
June 1, 1876	201 00
July 12, 1887. $153.45, $6.05	159 50
Nov. 1, 1877	51 50
Total	$1,251 00

The returns account for these collections as follows:

Return of 1876—Oct. 16, 1875	$200 00
Bro't for'd	200 00
Return of 1876—Dec. 24, '75	199 50
" of 1878—July 12, 1877	159 50
" " " —Nov. 1, 1877	51 50
" " 1880—Oct. 24, 1879	383 35
	$993 85
To this add item for Mrs. Lyon's note	240 00
	$1,233 85

Leaving unaccounted for of the money collected on said note $17.15 prin.

The returns, however, do not account for the items $100, Feb'y 25, 1876, and $100, March 20, 1876, and $201, June 1, 1876, at the proper time.

These two credits of $100 each should have been accounted for in return of 1876 and the $201.00 in return of 1877.

So this exception is properly overruled and the adm'r charged for said three items, as he is in the report for returns of 1876 & 1877.

The adm'r should, however, be credited in his return of 1880 with $383.35 or that sum deducted from the charges therein against him.

9th exception by Gray, as to the McGregor note, not sustained. The calculation is correct. Ev., 557 to 559, 802, 803, 801.

10th exception by Gray. Gilreath note. This exception not sustained. Adm'rs took no security on sale of the cotton, as by law they should have done, and thereby became liable for its price. The note so taken became the property of the adm'rs, and they became liable for the debt, and are not entitled to credit at all for it.

354

355 The note was theirs, and they owed the estate for the cotton. See item 67 in former report.

The 11th exception by Gray, relating to commissions, embracing the point taken in his 2d exception and some other items. As before shown, said 2d exception is overruled.

One other point: Gray claimed 10 per cent. com. on proceeds of sale of growing crops in field at death of Tumlin. The report allows him 6⅔ per cent. No error has been shown in that report so excepted to, and the exception 11th is overruled and not sustained.

The 12th exception by Gray as to balance in hands of adm'rs at their 1st return in 1876 is general, and necessarily includes in it the point taken in 2d and 11th exceptions; also in his 1st, 7th, 8th,

& 10th exceptions, and covers other points. The exception is a complain*ant* of the general result reached in the report without showing wherein the error lies. The matter has been carefully considered, and as some of said exceptions filed by Gray are in part sustained this will necessitate a modification of the general result, and will be worked out in the general statement of the account to be made in this report. The exception, then, is overruled, except so far as the sustaining other exceptions operate to sustain this.

356 The 13th exception by Gray not sustained as to item of $201, under the evidence. See item 87 in Exhibit K to original report, and Ev., p-. 803, 804, 860. Not sustained as to item $80 prin. & $24.70 int. on the Goodwin note. See Ev., p-. 941, *941*, 942, 828. Not sustained as to voucher 8 in 2d return. See said voucher and voucher 155 in 1st return and Ev., p-. 834, 835. These two vouchers appear to be a payment of the same fee twice and ought not have been made.

The 14th exception by Gray embraces three points; 1st, that general balance is too large; 2d, not enough commissions allowed the administrator; 3d, no commissions allowed on interest collected. To sustain the first point the exception relies on the returns as the only evidence. The returns were not the only evidence before the master in making said report relating to that point. Ev., p-. 941 to 942, 828, 827, 807, 829, 897, 898. This point in the exception covers all in most of the exceptions filed by Gray to the report relating to the 1st return and is not shown to be well taken except to such extent as the partial sustaining of other exceptions will modify the report on this point, all which will be worked out in and through the final statement of the account hereinafter made.

357 As to the 2d point in said exception there is nothing going to show that it is well taken or that the report in the point excepted to is incorrect, and hence the exception as to that point is not sustained.

As to 3d point in said exception 2d return shows only $97.69 collected as interest, but it is not shown whether said interest was on claims for money loaned or not, and therefore administrator is not entitled to 10 per cent. on same. See item 36 of former report & exception 1 and report thereon hereinbefore.

The 15th exception by Gray as to the $320 note on Gilbert, Tumlin, and Jackson, and interest thereon, is overruled. The receipt of the $180 from Gilbert and his release by Gray relieved the other joint makers and killed the debt, and Gray became bound to the estate to answer for the whole claim. Ev., 206, 207; 60 Ga., 70.

As to item of $490 interest the exception is sustained in part. The sum on which interest should have been charged is $6,694.86 instead of $7,000. This sum is the balance on hand after deducting the sum paid out between July 1, 1877, and July 1, 1878, to wit, $5,552.36, and also deducting com's for paying out said sum, to wit, $138.80. Code, 2602 (3 & 4); see also report on 16th, 17th, 18th, 19th, & 20th exceptions filed by complainants to former report.

Commissions on moneys received during the year are not in-

358 cluded in term current expenses of administration so as to

authorize the adm'r to retain at beginning of the year funds in his hands to meet the same. The amount for interest in said returns should have been $468.64 instead of $490.

The point in this exception that the commission allowed in said return *are* too small is overruled, no error appearing or being shown.

The point that the administrator was not allowed 10 per cent. commissions on interest reported as collected is not sustained on the ground that it does not appear from the evidence or the returns that any of said interest was collected on loans made either by the deceased Lewis Tumlin or by the administrators. See 1st exception by Gray and the report thereon hereinbefore.

16th exception by Gray, as to 1st point that balance brought from 3d return is too large, is not sustained, except as the general result may be modified by previous changes hereinbefore made and which will be worked out in final statement, no reason being shown for other modification.

As to point relating to rejection of voucher 23 in 4th return the exception is not sustained. See Ev., p. 889–891, showing that Julius Brown paid that sum and not Mr. Gray. From Brown's evi-
359 dence it seems he collected from the insurance Co. one-half of Culbersin's fee and paid it to him, and from voucher 20 in return of 1880 Gray, adm'r, paid him the other half and there gets credit for it.

The exception to the report for rejecting voucher No. 38 of return of 1879 in part is not sustained. The evidence showed that the adm'r was entitled to credit for part of the sum covered by said voucher, but not for all the sum covered by it. See items 56 & 57 of report.

This exception, so far as relates to item of $420, interest on $6,000, is not sustained. According to the rule of Code 2602 (3 & 4) the interest should have been calculated on $6,359.37 instead of on $6,000, thus making $445.15 instead of $420, as stated in the report.

Exception objecting to the general balance in said return of $1,386.62 has no ground to stand on and is not sustained except as the general result may be affected by modifications in former returns, which will all be worked out in general statement. So the exception, so far as it relates to commissions allowed being too small, is for same reasons overruled.

17th exception by Gray, as to points that balance brought forward from 4th return being too large; as to balance due estate from Gray July 1, 1880, to wit, $16,788.91, being too large;
360 that the commissions allowed adm'r in return for 1880 is too small, is overruled, no reason appearing to support it other than as such general result may be modified by former changes in amounts, &c., all which will be worked out in general statement.

This exception, so far as it complains of item $560 as interest charged against the adm'r on $8,000, is not sustained. I find that the sum on which interest should have been charged under rule aforesaid is $10,268.24, and the interest should be $718.77 instead of $560.

No commission of 10 per cent. was allowed adm'r on interest collected, because the evidence showed that nearly all of it was from debts not for loaned money, and the evidence failed to show that any of it was for loaned money. The regular commissions of 2½ per cent. was allowed for collecting the interest, same as collecting principal sums, and the exception to that extent is also overruled.

18th exception by Gray. The item $840 as interest on $12,000 for one year ought to have been $889.12 as — years' interest on $12,701.81, under rule aforesaid. Both Gray and complainants moving, excepted to former report in its finding on balance due on note of Thos. H. Baker, the evidence has been again reviewed and a new calculation made, and I find that the adm'r is charge-
361 able with prin. $77.87 and interest to July 1, '81, .52. See report on 34th exception of compl'ts.

The exception, *is* to the general balance found in said return, is not sustained, except as modified by former findings, &c.

19th exception by Gray, relating to general balance, not sustained except as modified by former findings, &c.

20th exception by Gray, as to item of $625 as not charged up against Mrs. Rice. See Ev., 443, 862, 863, 935.

21st exception by Gray is sustained as to item $100 as proper charge against Mrs. Lula T. Lyons, and she should be charged with $100, and interest thereon from — day of —, 18—.

This exception, as to item $264, is not sustained. The husband of Mrs. Lyon bought the corn and gave his note for it, and he is sued for it. Ev., 859, 860, 926.

Said exception is overruled as to item of note for $171. See Ev., p-. 926, 859, 860. It was her husband's debt, not hers.

22d exception by Gray, as to non-allowance of further extra compensation, is not sustained. Considering all the evidence, the manner in which the adm'r managed the estate, and the returns
362 made thereof, there appears no good reason for any greater extra compensation to be allowed the adm'r than was allowed in the former report. See Ev.—

J. A. Howard,	p. 304 to 306.
Thos. W. Baxter,	307 to 312.
Andrew Baxter,	312 to 317.
Wofford, W. T.,	381, 385, 386, 387, 390.
Bryant, C. W. A.,	411.
Aiken, T. W.,	501.
Erwin Lewis,	532, 533.
Wofford, A. P.,	693 to 704.
Milner, Thos. W.,	714 to 722.
Ford, F. M.,	747 to 751—

And others cited in item 47 of the former report.

All which is respectfully submitted.

Oct. 1st, 1884.

E. N. BROYLES,
Special Master.

363 *Special Master's Report Overruling Exceptions Filed by Sureties on Joint Bond of Gray and Erwin. Filed in Clerk's Office Oct.* 4, 1884. *A. E. Buck, Clerk.*

Exceptions to master's report by J. A. Erwin, J. G. B. Erwin, and H. C. Ramsaur, as executor of L. R. Ramsaur, deceased; W. J. Benham, R. L. Rodgers, A. C. Trimble, A. W. Mitchell, J. M. Veach, J. J. Heward, sureties on the joint bond of Gray & Erwin.

These defendants except to the former report of the special master in this case, and say said report was incorrect and wrong in holding John A. Erwin still liable as surety to Gray on said joint bond, although he had been discharged as co-administrator.

Also in holding that the discharge of said J. A. Erwin as co-administrator and the order of the court of ordinary of Bartow county discharging said Erwin and purporting to discharge the sureties on said bond did not, in fact, discharge said sureties.

Also that said report was wrong in not allowing to Gray and Erwin $3,433.68 as commissions for division of the real estate of said Tumlin's estate among his heirs, and in allowing only the sum of $500 for the same.

364 These are, in substance, said exceptions.

See the pleadings for the exceptions in full.

On the question of commissions for dividing said lands no additional evidence has been introduced in support of said exception, but reliance is had alone on the evidence which accompanies said original report; and, after hearing argument and duly considering & weighing said evidence, the special master sees no reason for sustaining said exception, and therefore reports that said exception is not sustained, but overruled.

In regard to said other exceptions said sureties have introduced certified copy of the record of the proceedings in the court of ordinary of Bartow county relating to the discharge of J. A. Erwin, as co-administrator of F. P. Gray, and of the proceedings of the superior court of Bartow county in same case, on appeal from the said court of ordinary. This copy record is in evidence and, as such, accompanies this report. This record — same facts as are set forth on page 10 to 13 of the original report of special master, and which is excepted to.

Said record further shows a judgment in Bartow superior court in said case, dated Feb. 16, 1884, *nunc pro tunc*, in said appeal case, in favor of John A. Erwin on the issues made in the above case,

365 and that his verification be *be* allowed. The record, however, does not show that the sureties on said bond or any one in their behalf ever instituted proceedings to be relieved from said bond, and it does not show any express proceedings by J. A. Erwin himself to be relieved from his legal position of surety to said Gray.

In the opinion of the special master the question stands substantially as it did before as to these sureties, and the question is now, and was before, Did the release or discharge of Erwin as co-administrator with Gray discharge the surety on said joint bond?

After hearing elaborate and learned arguments on both sides of this question the special master finds and reports that said excep-

tions are not well taken, and that said sureties were not discharged by Erwin's discharge as administrator. See items 39 & 40 of the original report, pages 23 to 26.

All which is respectfully submitted.

E. V. BROYLES,
Special Master.

Reasonable fee for special master in above matter, $200, to be — by parties filing exceptions.

E. V. BROYLES,
Special Master.

366 *Complainants' Exceptions to the Report of E. N. Broyles, Special Master, Filed October 4th, 1884, on the Liability of the Sureties on the Joint Bond of Gray and Erwin.*

In the United States Circuit Court, Northern District of Georgia.
Equity.

JAMES L. RICE and WIFE *vs.* FRANK P. GRAY and Others.

Exception 1st. Complainants except to the report of said special master in this, that said special master finds and reports as a fact "that the Erwins also admit that they know or were informed that Gray and Erwin had jointly administered on Tumlin's estate," whereas complainants insist he should have found and reported instead "that said Erwins admit that they were afterwards informed that Gray and Erwin had jointly administered on Tumlin's estate;" and complainants further except to the report in this that he finds and reports "that the makers of said powers of attorney were informed by him (John A. Erwin) before they signed said powers of attorney that Gray was to be his (Erwin's) co-ad-
367 ministrator," when, as complainants insist, he should have found and reported "that they were not so informed," or have found and reported "that several persons were spoken of as co-administrators, among whom Gray was mentioned, but it was not known who would be such co-administrator."

Exception 2nd. Complainants also except to the report of said special master, in this, that said special master finds and reports as a conclusion of law on the facts proven, "that the said three sureties (H. C. and J. G. B. Erwin and L. R. Ransour), respectively, authorized and empowered their attorney-in-fact, H. C. Ramsaur, to sign their names only to a bond to be given by John A. Erwin, as one of the administrators, and not to be a joint bond to be given by Gray and Erwin, and that in signing their names to said joint bond said attorney transcended express authority, and his act in so doing was void and not binding on either of said three sureties," whereas complainants insist he should have found and reported "that said signatures, under all the facts proven, *was* valid and binding upon all and each of said three sureties."

368 Exception 3rd. Complainants except to the report of said special master, in this, that he finds and reports "that neither

of said sureties are shown to have notified the act of their agent in signing their names to said bond, nothing short of a writing under their hand and seal to that effect would amount to a notification," when, as complainants insist, he should have found and reported " that said three sureties had notified the act of their agent in signing said bond, and that such notification could be shown by acts, words, or conduct, and by parol evidence in this case."

Exception 4th. Complainants also except to the report of the special master, in this, that the said special master finds and reports that " in this case the evidence does not show that any person, either the ordinary of Bartow county, the heirs of Tumlin or his creditor, from Dec., 1880, to July, 1881, or at any time since, acted upon or relied on the opinion or belief that these three sureties or either of them were liable on said joint bond, but, on the contrary,
369 all persons concerned seemed to regard not only these three but all the sureties on said bond as having been discharged in 1876 when John A. Erwin resigned, and from that time forward the ordinary and the parties at interest seemed to rely on the new bond and sureties afterwards given by Gray," when, as complainants insist, he should have found and reported the contrary, if anything, to wit: "That the presumption of law was that the heirs and creditors of Tumlin, for whose benefit and protection the joint bond of Gray and Erwin was given, relied upon that bond, as well as the subsequent bonds given by Gray, according to their legal terms, tenor, and effect, and that nothing to the contrary appeared from the evidence," and should have further found and reported that it did not appear from the evidence that any of the heirs or creditors knew or ever heard of any alteration in said powers of attorney until this defense was set up, about Sept. 10th, 1883, and that it did appear that they, the said sureties, knew they were sureties for Erwin and Gray or for Erwin in a joint administration with Gray, and that after they were informed of this fact, and before they set up said defense, or even made the same known, *that* said Erwin
370 and Gray had wasted above $45,000.00 of the assets of said estate, and said Erwin had removed from said State, and said Grad had become insolvent, and many of the other sureties on said bond or bonds had died, removed from the State, or become insolvent, to — injury of those for whose protection said bond was given.

W. K. MOORE,
GRAHAM AND GRAHAM,
Compl'ts' Solicitors.

Filing.

Filed in clerk's office October 30th, 1884.

A. E. BUCK, *Clerk.*

371 *Bill for Relief, Receiver, &c.*

In the United States Circuit Court for the Northern District of Georgia.

In Re JAMES L. RICE & WIFE *vs.* FRANK P. GRAY *et al.*

Exceptions taken by the defendants following, to wit, J. M. Veach, J. J. Howard, A. C. Trimble, R. L. Rogers, W. I. Benham, and A. W. Mitchell, sureties on the joint bond of Frank P. Gray and John A. Erwin, administrators on the estate of Lewis Tumlin, dec'd, to the report of special master, E. N. Broyles, Esq., to whom, by decree, the above-stated cause stands referred.

Exception 1st. For that the said master hath, in his second general report, certified that Frank P. Gray and John A. Erwin, administrators, did not make and file with the court of ordinary of Bartow county, Georgia, their first return in the manner required by law, in this, that they failed to account for all receipts and expenditures by them as administrators in said return, and that said master, by his said report, hath held that on acc't of such neglect on the part of said administrators *that* there should be allowed to them no commissions, and that all commissions, heretofore allowed them in his former report be forfeited and disallowed, whereas said special master should have held and reported that said Frank P. Gray and John A. Erwin, administrators, were entitled to the commissions claimed by them in their said first return, and should have allowed them credit on the account stated by him in his said report for all of the commissions so claimed by them. The evidence submitted to said special master and reported by him does not require a forfeiture of such commissions; neither does the statute require such forfeiture. See 1 page of 2nd general report of master and 1,
371½ 2, 3, & 4 in his report, in the exceptions filed to former report by complainants, with the evidence therein referred to.

Exception 2nd. For that said special master hath erred in his said report in holding and reporting that the discharge of J. G. B. Erwin, H. C. Erwin, and L. R. Ramsour, because their names had been improperly signed to the joint bond of Gray and Erwin, administrators, by their attorney-in-fact, did not discharge their co-sureties on said bond, whereas the evidence submitted to and reported by said master, hereinafter referred to, shows that the court of ordinary, in having said joint bond executed in his presence, as required by law, knew that the attorney-in-fact of the sureties above mentioned had no authority to sign such bond, and in taking their signatures to such bond the co-sureties were misled and their liability increased above that which appeared in the face of the bond, and said master should have held that they were thereby discharged. See special report of master on liability of sureties on Gray and Erwin bond, page —. See evidence of J. J. Howard, J. A. Howard, J. A. Erwin, W. T. Wofford, J. M. Veach, and others on this subject.

Exception 3rd. For that the said special master in his supplemental report, endorsed "Overruling exceptions," hath transcended the powers of a master in chancery in undertaking to overrule ex-

ceptions to his original report and in undertaking to pass upon and decide questions of law; also in holding in his said supplemental report that the judgment of the superior court of the county of Bartow, *nunc pro tunc*, upon the verdict rendered on the
372 appeal from the court of ordinary for said county on the petition of John A. Erwin for leave to resign as one of the administrators of Lewis Tumlin, dec'd, did not present an adjudication of all matters pertaining to the resignation of said Erwin and the sureties upon his bond as administrator, which adjudication is final and conclusive of the question of the resignation of said Erwin and his discharge and the discharge of all the sureties on the administration bond executed by said Gray and Erwin, and said special master erred in not so holding.

MYNATT & HOWELL,
THOMAS W. MILNER,
Sol'rs for Veach et al.

Filing.

Filed in office October 29, 1884.

R. E. BOYD,
Deputy Clerk.

373 *Bill, &c.*

In the United States Circuit Court for the Northern District of Georgia. In Equity in said Court.

JAS. L. RICE & WIFE *vs.* FRANK P. GRAY & Others.

Supplemental answer and petition of Cora Gray and of the defendants to said bill.

This defendant, Cora Gray, by way of further answer and petition to the court, shows that complainants by their original bill alleged that a large part of said estate of Lewis Tumlin, deceased, in said bill described, had been invested by defendant, Frank P. Gray, in property in the name of this defendant and for this defendant's benefit, and this defendant filed her answer to said original — denying said charge in said original bill. This defendant was then advised and believed that it was unnecessary for her to make other or further answer, for this defendant then thought and believed that said estate of Lewis Tumlin, dec'd, had not been wasted or misappropriated by John A. Erwin and Frank P. Gray, the administrators on said estate.

But this defendant says that she has now come to be informed that it appears in and by the report of E. N. Broyles, the
374 special master in said case, that the said administrators are indebted to said estate in the sum of about forty-five thousand eight hundred dollars for assets of said estate remaining in their hands unaccounted for and lawful interest thereon. She further shows that it appears in and by said report that a distribution in kind of said estate was made and each of the heirs-at-law had received thereby the sum of twenty-four thousand dollars, and it

further appearing in and by said report that since that time said administrators have advanced the following further sums, to wit:

To Mary L. Spencer about thirty-five hundred dollars.

To Lula T. Lyon the sum of about one thousand dollars.

To George H. Tumlin about thirteen hundred dollars.

To Ada S. Rice about six hundred dollars.

To Lewis T. Erwin, whose share in said estate is owned by John S. Leake, about eight hundred dollars.

And to this defendant about twenty-three hundred dollars.

These sums cannot now be accurately and precisely stated because said master's report, with all the other papers in said cause, are now in the hands of the court, the case having been heard and being now under consideration by the court.

375–812 This defendant therefore shows to the court that she is entitled to a decree for one-seventh of these aggregate sums as one of the heirs-at-law of the estate of Lewis Tumlin, less the aforesaid amount of twenty-three hundred dollars, and she prays that she may have a decree for the same against such of the defendants as are liable to her.

She shows that by the laws of Georgia she is a *feme sole* as to her separate estate, and was at the time of the death of her said father, Lewis Tumlin, and her husband, Frank P. Gray, has no interest by law in her separate estate. She therefore prays for such relief as she may be entitled to according to law, and that she may be allowed as a distributee to come in under any decree made or to be made by the court; & she will ever pray, &c.

W. M. GRAHAM,
Sol. for Def't, Cora M. Gray.

Filing.

Filed in office December 13, 1884.

R. E. BOYD,
Deputy Clerk.

* * * * * * *

813 EXHIBIT "A."

Bill, &c.

In U. S. Court.

JAS. L. RICE *et al. vs.* F. P. GRAY *et al.*

It is agreed, in order to save costs and trouble, to admit in evidence the returns of Gray and Erwin, adm'rs, and Gray, adm'r, and also the printed copies of the bonds as annexed to the bill of L. T. Lyon *vs.* F. P. Gray *et al.*, whenever certified copies of the same would be admitted in evidence. If it should appear that certified copies of the returns of the administrator, in possession and to be put in evidence by complainant, should differ from the originals,

the master shall take notes of such difference and hear evidence as to which is correct.

May 15th, 1882.

(Signatures) GRAHAM & FOUCHI & TUMLIN,
CANDLER & THOMSON & CANDLER,
For Comp'ts.
McKAY & ABBOTT, *for Adm'r.*
AKIN & AKIN,
For John A. Erwin and His Securities.

814 EXHIBIT "B."

(*Exhibit "A."*)

GEORGIA, *Bartow County:*

Know all men by these presents that we, Frank P. Gray and N. B. Tumlin, principals; A. Johnson, W. T. Wofford, John W. Gray, James M. Veach, and E. M. Price, securities, are held and firmly bound unto the ordinary of said county and his successors in office in the sum of two hundred thousand dollars; to the payment of which, well and truly to be made, we bind ourselves, and heirs, executors, and administrators of us and each of us, firmly by these presents.

Subscribed with our hands and sealed with our seals this eleventh day of June, 1875.

The condition of the above obligation is such that whereas the above-bound Frank P. Gray and N. B. Tumlin have this day applied to J. A. Howard, ordinary of said county, for and have obtained temporary letters of administration of the goods and chattles, rights and credits, of Lewis Tumlin, deceased: Now, if the above-bound Frank P. Gray and N. B. Tumlin shall carefully collect and preserve from waste or loss all the goods, chattles, and effects of the said Lewis Tumlin, deceased, and shall make or cause to be made a true and perfect inventory of all such estate, and, the same being so preserved, do surrender up such estate and effects with the inventory aforesaid unto the legal and proper administrators
815 on or before the first Monday in August next, or so soon thereafter as the ordinary shall direct, with all his other actings and doings therein, and faithfully perform the trust reposed in him, then this obligation to be void; otherwise to remain in full force in law.

FRANK P. GRAY. [L. S.]
N. TUMLIN. [L. S.]
A. JOHNSON. [L. S.]
WM. T. WOFFORD. [L. S.]
JOHN W. GRAY. [L. S.]
JAS. M. VEACH. [L. S.]
EDWIN M. PRICE, [L. S.]
By WM. T. WOFFORD, [L. S.]
Attorney-in-Fact.

Tested and approved by—
J. A. HOWARD, *Ordinary.*

GEORGIA, *Bartow County:*

I, J. A. Howard, ordinary in and for said county, hereby certify that the within is a full, true, and complete copy of the temporary administrator's bond of F. P. Gray and Napoleon Tumlin, temporary administrators of Lewis Tumlin, deceased, as of file in the ordinary's office of said county.

Witness my hand and seal this December 3, 1880.

J. A. HOWARD, *Ordinary.*

816 EXHIBIT "B."

STATE OF GEORGIA, *Bartow County:*

Know all men by these presents that we, Frank P. Gray and John A. Erwin, as principals, and William T. Wofford, Abda Johnson, John W. Gray, James M. Veach, Noah King, Edwin M. Price, A. C. Trimble, Joel H. Dyer, W. W. Rich, James C. Wofford, Nelson Gilreath, John J. Howard, A. W. Mitchell, Thomas Stokely, R. L. Rogers, L. R. Ramsaur, J. G. B. Erwin, Henry C. Erwin, W. I. Benham, John S. Leake, and Thomas Tumlin, as securities, are held and firmly bound and oblig-ed unto the honorable the ordinary of said county, for the time being, and his successors in office, in the sum of six hundred thousand dollars, to be paid to the said ordinary, his successors in office, or assigns; for which payment, well and truly to be made and done, we bind ourselves, jointly and severally, and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated at Cartersville this 2d day of August, A. D. 1875.

The conditions of the above obligation are such that if the above-bound Frank P. Gray and John A. Erwin, administrators of the goods, chattles, and credits of Lewis Tumlin, deceased, do make a true and perfect inventory of all and singular the goods, chattles, and credits of the said deceased which have or shall *have* come to
817 the hands, possession, or knowledge of the said Frank P. Gray and John A. Erwin, or in the hands or possession of any other person or persons for them, and the same so made do exhibit in the court of ordinary of said county when they shall be thereunto required, and such goods, chattles, and credits do well and truly administer according to law, and make a just and true account of their actions and doings therein when required by the superior court or the ordinary for said county, and all the rest of the goods, chattles, and credits which shall be found remaining upon the account of the said administration, the same being first allowed by the said court, shall deliver and pay to such persons respectively as are entitled to the same by law; and if it shall hereafter appear that any last will and testament was made by the said deceased and the same be proved before the court, and the executors obtain a certificate of the probate thereof, and the said Frank P. Gray and John

A. Erwin, as if in such case required, render and deliver up the said letters of administration, then this obligation to be void; else to remain in full force.

F. P. GRAY. [L. S.]
JOHN A. ERWIN. [L. S.]
WM. T. WOFFORD. [L. S.]
ABDA JOHNSON. [L. S.]
W. W. RICH. [L. S.]

And the following persons, to wit:

818

JOHN W. GRAY, [L. S.]
JAMES M. VEACH, [L. S.]
NOAH KING, [L. S.]
A. C. TRIMBLE, [L. S.]
EDWIN M. PRICE, [L. S.]
JOEL H. DYAR, [L. S.]
By their attorney-in-fact, WILLIAM T. WOFFORD. [L. S.]
JOHN S. LEAKE, [L. S.]
NELSON GILREATH, [L. S.]
J. C. WOFFORD, [L. S.]
J. J. HOWARD, [L. S.]
A. W. MITCHELL, [L. S.]
By J. J. HOWARD,
Attorney-in-Fact.
THOMAS STOKELY, [L. S.]
ROBERT L. ROGERS, [L. S.]
By J. J. HOWARD,
Attorney-in-Fact.
L. R. RAMSAUR, [L. S.]
J. G. B. ERWIN, [L. S.]
H. C. ERWIN, [L. S.]
By their attorney-in-fact, H. C. RAMSAUR.
W. I. BENHAM. [L. S.]
THOMAS TUMLIN. [L. S.]

Signed, sealed, and delivered in presence of—
J. A. HOWARD, *Ordinary.*

STATE OF GEORGIA, *Bartow County:*

I, J. A. Howard, ordinary in and for said county, do hereby certify that the within is a full, true, and complete copy of the administrator's bond of Frank P. Gray and John A. Erwin, administrators of Lewis Tumlin, deceased, dated 2d day of August, 1875, as appears of file and record in the ordinary's office of said county.

Witness my hand and seal of office this 14th day of October, 1880.

J. A. HOWARD, *Ordinary.*

819 EXHIBIT "C."

GEORGIA, *Bartow County:*

Know all men by these presents that we, Frank P. Gray, principal, and Abda Johnson, Wm. T. Wofford, E. M. Price, Noah King, W. W. Rich, John W. Gray, John S. Leake, Nelson Gilreath, J. C. Wofford, T. W. Leake, sureties, are held and firmly bound unto J. A. Howard, ordinary for said county, and his successors in office, in the just and full sum of one hundred and forty thousand dollars; for the payment of which sum to the said ordinary and his successors in office we bind ourselves and heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this second day of May, in the year eighteen hundred and seventy-six.

The condition of the above bond is such that whereas Frank P. Gray and John A. Erwin were heretofore, to wit, on the 2d day of August, A. D. eighteen hundred and seventy-five, appointed administrators of the estate of Lewis Tumlin, late of said county, deceased, and gave bond and security in the terms of the law; and whereas, on the 12th day of April, A. D. 1876, said John A. Erwin filed an application before the ordinary of said county to be permitted to resign his office of administrator on account of his bad health and physical infirmity, and said application having been heard
820 and his resignation allowed, and order having been passed by said court requiring said Frank P. Gray to give a new bond and security in the sum of one hundred and forty thousand dollars:

Now, if the above-bound Frank P. Gray shall well and truly administer the goods and chattles, rights and credits, lands and tenements, of the said Lewis Tumlin, deceased, which remains to be administered, and which have come to the hands, possession, or knowledge of the said Frank P. Gray, or in the hands or possession of any other person or persons for him, and the same do exhibit in the said court of ordinary, when he shall be thereunto required, and such goods, chattles, and credits do well and truly administer according to law, and do make a just and true account of his actings and doings therein when he shall be thereunto required by the court of ordinary of said county, and all the rest of the goods, chattles, and credits which shall be found remaining upon the account of said administration, the same being first allowed by the court, shall deliver and pay to such person or persons, respectively, as are entitled to the same by law; and if it shall hereafter appear that any last will and testament was made by said deceased and the same be proved before the court and the executor obtain a certificate of probate thereof and the said
821 Frank P. Gray do in such case, if required, render and de-

liver up the said letters of administration, then this obligation to be void; else to remain in full force.

FRANK P. GRAY. [L. S.]
ABDA JOHNSON. [L. S.]
WM. T. WOFFORD. [L. S.]
EDWIN M. PRICE. [L. S.]
NOAH KING. [L. S.]
WM. W. RICH. [L. S.]
J. W. GRAY, [L. S.]
By W. T. WOFFORD,
Attorney-in-Fact.
J. C. WOFFORD. [L. S.]
JOHN S. LEAKE, [L. S.]
By JOHN W. WOFFORD,
Attorney-in-Fact.
THOMAS W. LEAKE, [L. S.]
By JOHN W. WOFFORD,
Attorney-in-Fact.
NELSON GILREATH. [L. S.]

Attested and approved by—
J. A. HOWARD, *Ordinary.*

STATE OF GEORGIA, *Bartow County:*

I, J. A. Howard, ordinary in and for Bartow county, do hereby certify that the within is a full, true, and complete copy of the administrator's bond of Frank P. Gray, administrator of Lewis Tumlin, deceased, dated 2d day of May, 1876, as appears of file and record in the ordinary's office of said county.

Witness my hand and seal of office this the 14th day of October, 1880.

[SEAL.] J. A. HOWARD, *Ordinary.*

822 EXHIBIT "D."

GEORGIA, *Bartow County:*

Know all men by these presents that we, Frank P. Gray, principal, and Nelson Gilreath, A. P. Wofford, Thomas Tumlin, Abda Johnson, Noah King, F. M. Ford, John S. Leake, Thomas W. Leake, and John W. Gray, securities, are held and firmly bound unto J. A. Howard, ordinary of said county, and his successors in office, in the just and full sum of one hundred and forty thousand dollars; for the payment of which sum to the said ordinary and his successors in office we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 13th day of October, A. D. 1877.

The conditions of the above bond are such that whereas Frank P. Gray gave bond and security as the sole administrator of Lewis Tumlin, deceased, for the sum of one hundred and forty thousand dollars, said bond dated the 2d day of May, A. D. 1876, his co-administrator having resigned his trust, which resignation was allowed by order of the court of ordinary of said county; and

Whereas Wm. T. Wofford, James C. Wofford, and William W. Rich, three of the securities for the said Frank P. Gray, as administrator aforesaid, on said administrator's bond dated 2d day of May, 1876, filed an application for relief from all future liability on said administrator's bond in the court of ordinary
823 of said county on the 23 of March, 1877, making charges of mismanagement, etc.; and

Whereas at the October term, 1877, of said court said William T. Wofford, James C. Wofford, and William W. Rich withdrew their charges of mismanagement and claimed their release from liability on said bond as matter of right, and the said court of ordinary at said term having passed an order relieving said securities from all further liability on said bond and requiring said Frank P. Gray to give new bond and security in the sum of one hundred and forty thousand dollars:

Now, if the above-bound Frank P. Gray shall well and truly administer all the goods and chattles, rights and credits, lands and tenements, of the said Lewis Tumlin, deceased, which remains to be administered, — which have or shall come to the hands, possession, or knowledge of the said Frank P. Gray or in the hands or possession of any other person or persons for him, and the same do exhibit in the court of ordinary when he shall be thereunto required, and such goods, chattles, and credits do well and truly administer according to law, and do make a just and true account of his actings and doings therein when he shall be required thereunto by the court of ordinary of said county and all the rest of the goods, chattles, and credits which shall be found remaining upon the account of said administration, the same being first
824 allowed by the court, shall deliver and pay to such person or persons, respectively, as are entitled to the same by law, and if it shall hereafter appear that any last will and testament was made by said deceased, and the same be proven before the court and the executor obtain a certificate of probate thereof, and the said Frank P. Gray do in such case, if required, render and deliver up said letters of administration, then this bond to be void; else to remain in full force.

FRANK P. GRAY. [L. S.]
N. GILREATH. [L. S.]
THOMAS TUMLIN, [L. S.]
By his attorney-in-fact, A. P. WOFFORD.
A. JOHNSON. [L. S.]
NOAH KING, [L. S.]
By his attorney-in-fact, ABDA JOHNSON.
F. M. FORD. [L. S.]
JOHN S. LEAKE. [L. S.]
THOMAS W. LEAKE. [L. S.]
JOHN W. GRAY, [L. S.]
By his attorney-in-fact, A. P. WOFFORD.

Attested and approved by—
J. A. HOWARD, *Ordinary.*

STATE OF GEORGIA, *Bartow County:*

I, J. A. Howard, ordinary in and for said county, do hereby certify that the within is a full, true, and complete copy of the
825 administrator's bond of Frank P. Gray, administrator of Lewis Tumlin, deceased, dated 13th day of October, A. D. 1877, as appears of file in the ordinary's office of said county.

Witness my hand and seal of office this 14th day of October, 1880.

J. A. HOWARD, *Ordinary.*

826 GEORGIA, *Bartow County:*

Know all men by these presents that we, Frank P. Gray, as principal, and A. P. Wofford, John S. Leake, Thomas W. Leake, F. M. Ford, John W. Gray, N. Gilreath, Abda Johnson, as securities, are held and firmly bound unto J. A. Howard, ordinary of said county, and his successors in office, in the just and full sum of one hundred and forty thousand dollars; for the payment of which sum to the said ordinary and his successors in office we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 6th day of May, 1878.

The conditions of the above bond are such that whereas Frank P. Gray gave bond and security as the sole administrator of Lewis Tumlin, deceased, for the sum of one hundred and forty thousand dollars, said bond dated 13th October, 1877; and whereas Noah King, one of the securities of the said Frank P. Gray, as administrator as aforesaid, on said administrator's bond, dated 13th October, 1877, filed an application for relief from all further liability on said administrator's bond in the court of ordinary of said county, on the 12th day of February, 1878, on account of extreme old age and feeble health; and whereas at the March term
827 of said court of ordinary, 1878, said court of ordinary passed an order relieving said Noah King as security from all further liability on said bond, and requiring said Frank P. Gray to give new bond and security in the sum of one hundred and forty thousand dollars:

Now, if the above-bound Frank P. Gray shall well and truly administer all the goods and chattles, rights and credits, lands and tenements of the said Lewis Tumlin, deceased, which remains to be administered, and which have or shall come to the hands, possession, or knowledge of the said Frank P. Gray or in the hands or possession of any other person or persons for him, and the same do exhibit in the said court of ordinary when he shall be thereunto required, and such goods, chattles, and credits do well and truly administer according to law, and do make a just and true account of his actings and doings therein when he shall be thereunto required by the court of ordinary of said county, and all the rest of the goods, chattles, and credits which shall be found remaining upon the accounts of said administration, the same being first allowed by the court, shall deliver and pay to such person or persons, respectively, as are entitled to the same by law, and if it shall here-

after appear that any last will and testament was made by
828 said deceased, and the same be proven before the court and the executor obtain a certificate of probate thereof, and the said Frank P. Gray do in such case, if required, render and deliver up said letters of administration, then this bond to be void; else to remain in full force.

FRANK P. GRAY, [L. S.]
A. P. WOFFORD, [L. S.]
JOHN S. LEAKE, [L. S.]
THOS. W. LEAKE, [L. S.]
By A. P. WOFFORD,
Their Attorney-in-Fact.
F. M. FORD. [L. S.]
J. W. GRAY, [L. S.]
By his attorney-in-fact, A. P. WOFFORD.
N. GILREATH. [L. S.]
A. JOHNSON. [L. S.]

Attested and approved by—
J. A. HOWARD, *Ordinary.*

STATE OF GEORGIA, *Bartow County:*

I, J. A. Howard, ordinary in and for said county, do hereby certify that the within is a full, true, and complete copy of the administrator's bond of Frank P. Gray, administrator of Lewis Tumlin, deceased, dated 6th day of May, 1878, as appears of file in the ordinary's office of said county.

829–1047 Witness my hand and seal of this office 14th day of October, 1880.

J. A. HOWARD, *Ordinary.*

* * * * * * *

1048 EXHIBIT "L."

RICE and WIFE *vs.* GRAY & Others.

It is admitted that the removal of J. A. Erwin & Thomas Tumlim from the State and the death of Thos. Stokely, Abda Johnson, and L. R. Ramseur are correctly stated in the bill, and it is also admitted that Henry Ramseur has been duly appointed administrator of L. R. Ramseur, deceased.

GRAHAM & FOUCHI,
For Comp'ts.
McCOY & ABBOTT,
For Gray.
M. A. STANSEL &
AKIN & AKIN,
For John A. Erwin's Securities.

1049 EXHIBIT "N."

GEORGIA, *Bartow County:*

To the ordinary of said county:

The petition of John A. Erwin, of said county, showeth that Frank P. Gray, of said county, and your petitioner were appointed administrators on the estate of Lewis Tumlin, late of said county, now deceased, who died in said county intestate, and that letters of administration issued to said Frank P. Gray and your petitioner on the first day of August, 1875; that said Lewis Tumlin left as his heirs-at-law and distributees of his estate his widow, Mrs. Mary L. Tumlin, Napoleon Tumlin; Mrs. Lula T. Lyon, wife of Thomas J. Lyon; Mrs. Cora Gray, wife of Frank P. Gray; George Henry Tumlin, a minor, and Lewis T. Erwin; that Mrs. Cora Gray is a minor, and that her husband, Frank P. Gray, is her guardian; that your petitioner has been regularly appointed and qualified and given bond and security as guardian of George Henry Tumlin and Lewis T. Erwin, and that all of said heirs-at-law and distributees of the estate of Lewis Tumlin, deceased, reside in said county; that Mrs. Ada S. Rice, wife of James L. Rice, who resides in Nashville, Tennessee, is also one of the heirs-at-law of said Lewis Tumlin and a distributee of his estate; and your petitioner is in bad health, and from his physical infirmity is unable to give that attention to
1050 the management of said estate that he otherwise would and that he ought to give as administrator; that most of the real estate belonging to said estate and a great portion of the personalty has been divided and delivered to the distributees of said estate; that Frank P. Gray, the co-administrator of your petitioner, is willing to give new bond and carry on said administration of said estate alone. Your petitioner, therefore, prays that he be permitted to resign his office of administrator on the estate of said Lewis Tumlin upon a full and complete compliance with the law in such case made and provided; and your petitioner prays that each of said heirs-at-law of said Lewis Tumlin hereinbefore named may be cited by your honor to be and appear before your honor on the first Monday in May next, then and to show cause, if any they have, why your petitioner should not resign his office of administrator as aforesaid on his complying with the law in such case made and provided.

And your petitioner will ever pray, &c.

April 11, 1876.

JOHN A. ERWIN.

GEORGIA, *Bartow County:*

ORDINARY'S OFFICE.

To Mrs. Mary L. Tumlin, Napoleon Tumlin, Mrs. Lula T. Lyon, Frank P. Gray, and all the other persons named in the
1051 foregoing petition as heirs-at-law of and distributees of the estate of Lewis Tumlin, deceased, and to the guardians of the minor heirs named in said petition:

You are hereby cited and required to appear at the court of ordinary to be held on the first Monday of May next, then and there to show cause, if any you have, why John A. Erwin, one of the administrators on the estate of Lewis Tumlin, deceased, should not be permitted to resign the office of administrator of said estate for the cause set forth in said petition when the law in such case made and provided is fully complied with; and it is further ordered that each of said heirs-at-law who are of full age and the guardians of the minor heirs be served with a copy of the foregoing petition and this citation (unless they should acknowledge service) ten days before the time appointed for hearing said petition and passing on the same.

Given under my hand and seal of office this April 11th, 1876.

J. A. HOWARD, *Ordinary.*

Filed in office April 12th, 1876.

J. A. HOWARD, *Ordinary.*

Due and legal service is hereby acknowledged of the within petition and citation and further service waived April 13, 1876.

JOHN A. ERWIN,
Guard. for G. H. Tumlin.
JOHN A. ERWIN,
Guard. for L. T. Erwin.
1052 FRANK P. GRAY, *Adm'r.*
FRANK P. GRAY,
Guard. for Cora Gray.

I acknowledge service of the within petition this April 17th, 1876.

ADA S. RICE.
MARY L. TUMLIN.
N. TUMLIN.

Due and legal service of the within petition and citation is hereby acknowledged and further service waived April 20th, 1876.

MARY L. TUMLIN.
N. TUMLIN.

Served Mrs. Lula T. Lyon in person with a copy of the within petition and citation April 20th, 1876.

G. L. FRANKS,
Deputy Sheriff.

GEORGIA, *Bartow County:*

In person came before me, J. A. Howard, the ordinary of said county, Harry J. Erwin, who, being duly sworn, on oath says that he did, on the seventh day of April, in the year 1876, hand a copy

of the foregoing and annexed petition of John A. Erwin and a copy of the citation, signed by the ordinary, J. A. Howard, to Mrs. Ada S. Rice, in person, a daughter of Col. Lewis Tumlin, late of said county, deceased, and at the same time said Mrs. Ada S. Rice wrote the following on said original, to wit: "I acknowledge service of the within petition this April 17th, 1876," and then and there signed
1053 her name to the same.

HARRY J. ERWIN.

Sworn to and subscribed before me this 1st day of May, 1876.
J. A. HOWARD, *Ordinary.*

I, Frank P. Gray, one of the administrators of Lewis Tumlin, deceased, do hereby signify my willingness for John A. Erwin, my co-administrator of said estate, to resign for the reasons set forth in his petition, I retaining the sole administration in my own name, and I hereby propose to file such bond in furtherance of the same as the ordinary may deem proper in the premises.

Done this May 1st, 1876.

FRANK P. GRAY,
Adm'r of Lewis Tumlin, Deceased.

Filed in office May 1, 1876.

J. A. HOWARD, *Ordinary.*

Application of the Administrator to Resign the Administration.

Court of Ordinary, Bartow County. Regular Term, May 1st, 1876.

JOHN A. ERWIN, One of the Adm'rs of Lewis Tumlin, Dec'd,

vs.

FRANK P. GRAY, Adm'r; FRANK P. GRAY, Guard.; MARY L. TUMLIN, NAPOLEON TUMLIN, *et al.*, Heirs-at-Law, &c.

Upon considering the above and foregoing application of John A. Erwin, one of the administrators on the estate of Lewis Tum-
1054 lin, late of Bartow county, deceased, for leave to resign his said office of administrator, and all the heirs-at-law of Lewis Tumlin having been duly served with citation to show cause why John A. Erwin should not be allowed to resign the office of administrator on the estate of Lewis Tumlin, dec'd, and all of said heirs being represented now before the court, and no sufficient cause being shown why said Erwin should not be allowed to resign his trust, as administrator as aforesaid, and it appearing to the court that the bodily health, physical infirmities, and the health of his wife are such that he is unable*d* to give his attention to the management of the business of said estate, and Frank P. Gray, being cited to appear before the court, and having been served with said citation, and now coming before the court and expressing a willingness to accept the office of administrator of the estate of Lewis Tumlin, dec'd, and it appearing to the court that the allowing of said Erwin to resign his office of administrator will not injure the interest of said estate in any way: Therefore ordered and adjudged by *by* the court that the

resignation of the said John A. Erwin of the office of administrator on the estate of Lewis Tumlin, deceased, be, and the same is hereby, allowed, and it is hereby further ordered
1055 and adjudged by the court that Frank P. Gray, the co-administrator of the said John A. Erwin upon the estate of the said Lewis Tumlin, deceased, be, and he is hereby, declared and appointed the sole administrator of the estate of the said Lewis Tumlin, deceased, and the said Frank P. Gray is hereby required to give a new bond and security, for the faithful administration of said estate, in the sum of one hundred and forty thousand dollars, and upon said bond and security being given, and the said John A. Erwin, upon his settling and accounting with said Frank P. Gray, the sole and remaining administrator of the estate of Lewis Tumlin, deceased, his successor, of his accounts as administrator, and the filing — the receipt of his successor in the ordinary's office, as provided by law, and upon so doing that the said John A. Erwin, and administrators and his security-s, be, and they are hereby, discharged from any and all liability for any mismanagement of said estate in the future, but not from any past liability of the said John H. Erwin, as administrator as aforesaid.

Granted in open court, May term, 1876.

J. A. HOWARD, *Ordinary.*

Application for Discharge, &c.

Court of Ordinary, Bartow County, Adjourn- Term.

1056 JOHN A. ERWIN, Adm'r Est. Lewis Tumlin, Dec'd.

JUNE 12TH, 1876.

Upon considering the above application of John A. Erwin, one of the joint administrators of the estate of Lewis Tumlin, late of Bartow county, deceased, for a discharge, and the said John A. Erwin, as administrator, having by order of this court been permitted to resign said trust, and which resignation has been accepted by the court and Frank P. Gray, his co-administrator, having consented to accept the entire adminstration of said estate, and having given new bond and security, as ordered by the court, and the said John A. Erwin having filed a return showing the property that has been administered belonging to said estate, and having filed the said Frank P. Gray's receipt for all the unadministered property belonging to said estate, and being satisfied that said return and receipt contain all the property administered and not administered belonging to said estate which has come into the hands of John A. Erwin, as administrator, it is therefore ordered that said John A. Erwin be, and he is hereby, fully discharged from the office of administrator on the estate of Lewis Tumlin, deceased, and that letters of dismission do issue to him.

1057 Granted in open court June adj'r. term, 1876.

J. A. HOWARD, *Ordinary.*

STATE OF GEORGIA, *Bartow County:*

I, J. A. Howard, ordinary in and for said county, do hereby certify that the above and foregoing is a full and true copy of the proceedings discharging John A. Erwin, one of the administrators of the estate of Lewis Tumlin, deceased, as appears of record on the minutes of the court of ordinary of said county.

Witness my hand and seal of office this April 21st, 1882.

J. A. HOWARD, *Ordinary.*

Filing.

Filed in clerk's office August 24th, 1885.

O. C. FULLER,
Dep'ty Cl'k.

1058 EXHIBIT "M."

GEORGIA, *Bartow County:*

Application for Order Allowing Commission on Property Delivered to the Distributees in Kind.

Court of Ordinary, Bartow County. Regular Term, May the 1, 1876.

FRANK P. GRAY — JOHN A. ERWIN, Adm'rs Est. Lewis Tumlin, Dec'd.

To the ordinary of said county:

The petition of Frank P. Gray and John A. Erwin, who are administrators of Lewis Tumlin, deceased, show to the court as follows: That they, as administrators aforesaid, have distributed to the heirs-at-law of the said deceased the following real estate, which was taken at the appraised value hereinafter set forth, and the same turned over to the parties set forth:

The Sproull plantation, in the 17th dist., to Mrs. Rice	9,000 00
House and lot in Cartersville, known as the Erwin place, occupied by Dr. Hardy	3,250 00
House and lot in Cartersville, known as the James Milam place, occupied by F. P. Gray	3,000 00
Storehouse and lot on Main street, in Cartersville, occupied by S. F. Milam & Co., to Mrs. Rice	2,500 00
Storehouse and lot now occupied by Myer & Co., west of depot, in Cartersville, to L. T. Erwin	2,500 00
Storehouse and lot in Cartersville on Main St., occupied by M. Leibman, to L. T. Erwin	1,800 00
The home place, divided between the seven heirs to said estate, appraised at	92,406 00
Making the sum total of	$114,456 00

In real estate, which has been turned over in kind to the heirs-at-law of said deceased. The responsibility and the trouble in affect-

ing the transfer has been considerable. Your petitioners allege that they have received no compensation at all for this service thus rendered said estate, and pray your honor to pass an order allowing them three per cent. on said sum of $114,456.00 as commission on the same.

1059 And your petitioners will ever pray, &c.

WOFFORD AND MILNER,
W. T. WOFFORD,
A. JOHNSON,
Att'ys for P't'rs.

Upon considering the above application of John A. Erwin and F. P. Gray, administrators of the estate of Lewis Tumlin, deceased, for extra compensation for delivering and dividing to the heirs-at-law the real estate in kind belonging to said deceased, it is ordered by the court that they be, and are hereby, allowed three per cent. on the appraised value of the property so delivered in kind to said distributees, to wit, on the sum of ($114,456.00) one hundred and fourteen thousand four hundred and fifty-six dollars.

Granted in open court, May term, 1876.

J. A. HOWARD, *Ordinary.*

STATE OF GEORGIA, *Bartow County:*

I, J. A. Howard, ordinary in and for said county, do hereby certify that the above and foregoing is a full, true, and complete copy of the application and order passed by the court of ordinary of said county allowing F. P. Gray and J. A. Erwin, adm'rs of the estate of Lewis Tumlin, deceased, commissions for delivering property in kind, as appears of record on the minutes of said court of ordinary.

Witness my hand and seal of office April 21, 1882.

J. A. HOWARD, *Ordinary.*

1060–1068 EXHIBIT "O."

The following is a list and schedule of all the property, both real and personal, belonging to the estate of Lewis Tumlin, late of Bartow county, deceased, which has come into the possession of F. P. Gray and J. A. Erwin, adm'rs of said estate, and which remains unadministered and in their possession the 6th day of May, 1876. The wild lands belonging to said estate have not yet been fully located, and are not embraced in the following list:

* * * * * * *

1069 Received of John A. Erwin all of the foregoing mentioned and described property belonging to the estate of Lewis Tumlin, late of Bartow county, Ga., deceased, so far only as his possession of said property extends as a co-administrator on said estate, he and I having been appointed administrators jointly and letters of administration having issued to us jointly and he having resigned his office of administrator, I now receipt him and take sole charge and possession of said property; said list of articles contains all the

property now belonging to said estate unadministered, so far as is known by me. There may be some wild lands, but if so the title to the same is not yet obtained. The foregoing property now receipted for and the return made by myself and J. A. Erwin, adm'rs, embrace all the property, real and personal, of every kind that has come unto our hands or possession, administered and unadministered.

This May 6, 1876.

F. P. GRAY,
Adm'r of Lewis Tumlin, Deceased.

Acknowledged before me—

J. A. HOWABD, *Ordinary.*

Filed in office of ordinary May 22, 1873.

J. A. HOWARD, *Ordinary.*

STATE OF GEORGIA, *Bartow County:*

I, J. A. Howard, ordinary in and for said county, do hereby certify that the above and foregoing is a full, true, and complete copy of the goods, chattels, rights and credits, lands and tenements, of the estate of Lewis Tumlin, deceased, as turned over by John A. Erwin, adm'r to F. P. Gray, his successor, and F. P. Gray's receipt for the same, as appears of record in the ordinary's office of said county.

Witness my hand and seal of office this April 20, 1882.

J. A. HOWARD, *Ordinary.*

1070 EXHIBIT "P."

Application to be Allowed to Resign the Office & Trust of Administrator on the Estate of Lewis Tumlin & Appeal by the Defendants from Court of Ordinary.

JOHN A. ERWIN

vs.

Mrs. MARY L. TUMLIN, Mrs. LULA T. LYON, & NAPOLEON TUMLIN, Heirs-at-Law of Lewis Tumlin, Dec'd.

When the above case was called for trial Mrs. Mary L. Tumlin asked to be dismissed as one of the appellants in said case, and, there being no objection, it is ordered that Mrs. Mary L. Tumlin be, and she is hereby, dismissed as one of the appellants in said case.

C. D. McCUTCHEN,
J. S. C. C. C.

JOHN A. ERWIN, Adm'r of Lewis Tumlin,

vs.

Mrs. MARY L. TUMLIN, N. TUMLIN, & Others, Heirs-at-Law of Lewis Tumlin, Dec'd.

We, the jury, find in favor of John A. Erwin and that his resignation be allowed.

August 4, 1876.

T. H. STALL, *Foreman.*
BENJ. F. GODFREY.
J. J. CALHOUN.
WM. M. LOVELESS.
EDW'D E. LEWIS.
MEREDITH ANDERSON.
STEPHEN S. SUGGERS.
PLEASANT S. SHELMAN.
PETER MARK.
WM. W. MORRIS.
A. C. DAY.
H. C. WOLFE.

1071 *Application to Resign as Co-administrator and Nominating Frank P. Gray as His Successor.*

JOHN A. ERWIN, Adm'r of Lewis Tumlin, Dec'd,

vs.

MARY L. TUMLIN, N. TUMLIN, & Others, Heirs-at-Law of Lewis Tumlin, Dec'd.

Appeal to the superior court of Bartow Co., Ga., from the order in the ordinary's court of said county permitting John A. Erwin to resign and F. P. Gray to become sole adm'r of said estate, and required to give new bond, and Gray to become sole adm'r of said estate, and refusing to allow Theodore Smith to be co-adm'r of said estate. Appeal from the above decision of the ordinary made May 1st, 1876, and carried to the superior court of said Co., by whom the decision of said ordinary was affirmed at the July term, 1876.

It appearing to the court that on account of the temporary loss of the papers from the clerk's office, and the attorneys of the appel-ants because of that being compelled to consume much time in seeking to establish the same, thereby not being able to perfect their motion for a new trial and make and agree upon a brief of the evidence, which is very volum-nous, it is hereby ordered by the court that the appellants have thirty days from the adjournment of this
1072 court to do these things, and that said motion be heard in vacation at such time as counsel may agree upon if it suits the court, and that if a motion for a new trial be refused the appellants can take it to the supreme court of Ga. at the next January term thereof, and that returns of the adm'r in said case be used in the motion for a new trial and not copies of the same, and to be

heard at chambers in Gordon county on Tuesday after the second Monday in September next, at the court-house in said county, at chambers.

C. D. McCUTCHEN,
J. S. C. C. C.

We agree to this.

WOFFORD & MILNER.
WARREN AKIN & SON,
Atty's for Jo. A. Erwin.
G. H. BATES,
G. C. TUMLIN,
For Appellants.

STATE OF GEORGIA, *Bartow County:*

I, O. D. Anderson, deputy clerk superior court of Bartow county, Georgia, do hereby certify that the above and foregoing is a true copy from the records in this office.

Clerk's office, superior court, May 24, 1882.

[SEAL.] O. D. ANDERSON,
Deputy Clk S. C.

1073 EXHIBIT "Q."

GEORGIA, *Bartow County:*

Know all men by these presents that we, Frank P. Gray, as principal, and D. W. K. Peacock, John W. Gray, Edwin M. Price, and John S. Leak, as sureties, are held and firmly bound unto John A. Erwin, his heirs, executors, and administrators, in the sum of forty thousand dollars; for the payment of which we bind ourselves, our heirs, executors, and administrators, firmly by these presents, subject to the following conditions:

The said John A. Erwin and the said Frank P. Gray were appointed administrators on the estate of Lewis Tumlin, late of said county, now deceased, and gave bond as required by law, with W. T. Wofford, Abda Johnson, W. W. Rich, J. W. Gray, J. M. Veach, Noah King, A. C. Trimble, E. M. Price, Joel H. Dyer, John S. Leak, Nelson Gilreath, J. C. Wofford, Thos. Tumlin, J. J. Howard, A. W. Mitchell, Thos. Stokely, Robert L. Rogers, L. R. Ramseur, J. G. B. Erwin, H. C. Erwin, and W. I. Benham as sureties, on the second day of August, in the year eighteen hundred and seventy-five (1875), and letters of administration were issued to the said John A. Erwin and Frank P. Gray, jointly, on the estate of said Lewis Tumlin, and a large portion of said estate has been administered, most of the land having been divided, appraised, and delivered over to the heirs-at-law and distributees of the estate of the
1074 said Lewis Tumlin, as provided by *by* law in such cases made and provided; and the said John A. Erwin, being in failing health and feeble in body and unable to give further attention to the administration of said estate, applied to the ordinary of said county, as provided by law, asking leave to resign his trust as one of the administrators on said estate, which resignation was allowed by said ordinary and the said John A. Erwin ordered to be dis-

charged upon his complying with the law in such cases made and provided; and the said John A. Erwin, having settled all his accounts with the said Frank P. Gray (who has given new bond and security as required by the ordinary), & the said John A. Erwin, having filed with the ordinary the receipt in full of the said Frank P. Gray, who is now the sole administrator on the estate of said Lewis Tumlin, and the said ordinary having passed an order discharging the said John A. Erwin from the office of administrator, and all the estate, real and personal, of the said Lewis Tumlin that has not been administered being now in the hands, control, and possession of the said Frank P. Gray, and the said John A. Erwin, being still in feeble health and quite infirm and knowing that life is uncertain, has and does by these presents transfer, assign, turn over, and deliver to the said Frank P. Gray all the commissions
1075 and compensation that has been or may be allowed by the ordinary or the law of the State to the said John A. Erwin for his service rendered as administrator of said estate, to be recovered, held, used, and enjoyed by the said Frank P. Gray as his sole right and property; and in consideration thereof the said Frank P. Gray hereby binds himself, his heirs, executors, and administrators, to pay and satisfy any judgment or decree or order that may be made, rendered, or pronounced by any court of law or equity, and all expense or costs necessarily incurred in defence of any suit against the said John A. Erwin for any waste, loss, or damage or injury caused or occasioned by any act or failure of duty in any way whatever by the said John A. Erwin, as administrator of the said estate of the said Lewis Tumlin, to any heir-at-law or creditor of said Lewis Tumlin; and when this is done fully in all respects by the said Frank P. Gray or his sureties, whose names are signed to this bond, and the said John A. Erwin is saved from all loss, damage, attorneys' fees, and costs of every kind whatever for or on account of his having been one of the administrators of the estate of the said Lewis Tumlin, provided the said Frank P. Gray shall have exclusive right to employ all counsel and make all
1076 contracts in regard to attorneys' fees, and the sureties of said John A. Erwin or his said bond are saved from like loss, damage, attorneys' fees, and costs of every kind whatever for or on account of having signed said bond as sureties for said John A. Erwin for any act, failure to act, or omission of duty of said John A. Erwin, or any liability of his on his said bond, provided the said Frank P. Gray shall have exclusive right to employ all counsel and make all contracts in regard to attorney's fees, then this bond is to be null and void; else to remain in full force.

In witness whereof the said Frank P. Gray and his sureties have hereunto set their hands and affixed their seals this the 16th day of June, 1876.

F. P. GRAY. [SEAL.]
D. W. K. PEACOCK. [SEAL.]
JNO. W. GRAY. [SEAL.]
EDWIN M. PRICE. [SEAL.]
JOHN S. LEAK. [SEAL.]

1077 EXHIBIT "R."

GEORGIA, *Bartow County:*

By virtue of an order from the hon. court of ordinary of said county, to us directed and authorizing and requiring us to make distribution of the lands of Lewis Tumlin, dec'd, late of said county, lying and being in the county and State aforesaid, among the distributees entitled to said land and estate, we proceeded to the performance of that duty. There were seven distributees, to wit: Mary L. Tumlin, widow of the deceased; Napoleon Tumlin, Ada S. Rice, & Lula T. Lyon, children of the deceased, of full and lawful age; Cora Gray, minor child of said deceased, whose interest was represented by Frank P. Gray, guardian of said minor; George H. Tumlin, minor son of said deceased, and Lewis T. Erwin, minor grandson of said deceased, both of the last-mentioned minors being represented by John A. Erwin, guardian of said minors. The said land, as far as practicable, *were* divided as follows:

By consent of all the distributees there was distributed and assigned to Mary L. Tumlin, widow of deceased, without lot or drawing, a maximum amount of the land now to be divided (twenty-four thousand dollars' worth, as will appear below), after which the unadvanced and less advanced distributees were made nearly equal to those distributees who had received advancements from deceased in his lifetime and from the administrators since his death, and
1078 then the balance of the lands were divided into six shares, numbered 1, 2, 3, 4, 5, 6, which were assigned to the distributees in the following manner: Each share as numbered was placed in an envelope, and the envelopes, having been well mixed after numbers had been placed in them, were put in a hat, and each distributee drew from the — one envelope, containing the number of his or her share. The following was the result:

No. 1. Frank P. Gray, guard. for Cora Gray.
No. 2. Napoleon Tumlin.
No. 3. J. A. Erwin, guard. for Lewis T. Erwin.
No. 4. J. A. Erwin, guard. for Geo. H. Tumlin.
No. 5. Ada S. Rice.
No. 6. Lula T. Lyon.

No. 1 consisted of the following lots and parts of lots of land in the 4th district & 3rd section of Bartow county: Parts of lots Nos. 600 & 601, containing 37 acres; part of lot No. 598, containing 21 A. 28 P.; part of lot No. 629, containing 25 acres 32 P.; lot No. 599, containing 39 acres 1 R. & 34 P.; part of lot No. 627, off of west side of said lot, containing 14 acres; lot No. 628, containing 39 A. 1 R. 20 P., amounting *to* all, according to Hill's survey, — 175 A. 3 R. 34 P., valued at $11,597.25.

No. 2 consisted of the following lots and parts of lots of land in the 4th district and third section, Bartow county: Lot 624,
1079 containing 44 A. 1 R. 26 P.; lot 673, containing 41 A. 2 R. 28 P.; part of lot No. 674, containing 16 A.; lot No. 697, containing 39 acres; part of lot No. 696, off of north side of said lot,

containing 27 acres, amounting — all, according to Hill's survey, to 168 A. 14 poles, valued at $11,541.90.

No. 3 consisted of the following lots and parts of lots of land in the 4th district, 3rd section, of Bartow county: Lot No. 626, containing 43 A. 8 P.; lot No. 671, containing 40 A. 1 R. 38 P.; part of lot No. 770, to be surveyed off of east side of said lot, containing 27 A.; part of lot No. 698, on northwest side of said lot, containing 11 A. 3 R. 30 P.; lot No. 743, containing 40 A. 8 P.; lot No. 744, containing 39 A. 1 R. 10 P.; that part of lot No. 745 lying on north side of Etowah river, containi-g 14 A. 3 R. 29 P.; part of lot No. 696, to be surveyed off of south side of said lot, containing 8 A. 3 R. 22 P.; part of lot No. 769, lying on north side of Etowah river, containing 20 A. 3 R. 10 P., amounting in all, according to Hill's survey, — 246 A. 1 R. 5 P., valued at $11,559.31.

No. 4 consisted of the following lots and parts of lots of land in the 4th district, 3 sect., Bartow county: Lot No. 845, containing 44 A.; lot No. 812, containing 44 A.; part of lot No. 813, to be surveyed off of west side of said lot, containing 27 A. 2 R.; lot No. 773, containing 43 A. 1 R. 32 P.; lot No. 740, containing 43 A. 1 R.; part
1080 of lot No. 739, containing 11 A. 2 R.; lot No. 702, containing 37 A. 1 R. 8 P.; north part of lot No. 666, containing 20 acres 4 P.; lot No. 667, containing 38 A. 1 P.; part of lot No. 701, off of south side of said lot, containing 12 A., amounting in all, according to Hill's survey, to 321 A. 5 P., valued at $11,572.87.

No. 6 consisted of the following lots and parts of lots of land in the 4th district, 3rd sect., Bartow county: Part of lot No. 843, off of east end of said lot on north side of Etowah river, containing 6 A. 3 R. 5 P.; lot No. 814, containing 43 A. 1 R. 20 P.; part of lot No. 815, containing 21 A. 1 R. 2 P.; lot No. 771, containing 42 A. 3 R. 33 P.; part of lot No. 770, to be surveyed off of west side of said lot, containing 14 A.; lot No. 742, containing 42 A. 3 R.; lot No. 699, containing 42 A. 31 P.; lot No. 670, containing 42 A. 3 R. 33 P.; part of lot No. 627, off of east side of said lot, containing 31 A. 2 R. 28 P., amounting in all, according to Hill's survey, to 287 A. 1 R. 12 P., valued at $10,614.27.

No. 5 consisted of the following lands and city property in Cartersville: The plantation or farm known as the "Mrs. Rebecca Sproull or Cresswell Farm," on Etowah river, in 17 district, 3rd section, Bartow county, Georgia, containing 600 acres, more or less; Nos. not known, valued at ---------- $9,000 00

1081 One brick storehouse and lot in Cartersville on south side Main street, now occupied by S. F. Milam & Co., valued at ---------- 2,500 00

Making consolidated value ---------- 11,500 00

The maximum distribution was $24,000.00.

To Mrs. Mary L. Tumlin, widow of deceased, we assigned and distributed the following lots and parts of lots of land in 4th dist., 3rd sect., Bartow county: Lot No. 625 (including homestead improvements), containing 42 A.; lot No. 672, containing 39 A. 2 —; part of

lot No. 698, to be surveyed off of east side of said lot, containing 28 A., amounting in all, according to Hill's survey, to 109 A. 2 R., valued at $24,002.50.

To John A. Erwin, guardian for Geo. H. Tumlin, minor distributee, was assigned and distributed the following lots and parts of lots of land in 4th district, 3rd section, Bartow county, to make him about equal with the more advanced distributees: Lot No. 884, containing 40 A. 24 P.; part of lot No. 817, containing 2 A. 12 P.; part of lot No. 885, containing 11 A. 3 R. 11 P. on north side of Etowah river and 7 A. 1 R. 36 P. on south side of said river and west of Pumpkinville creek; lot No. 844, containing 37 A. 1 R.; part of lot No. 813, to be surveyed off of east side of said lot, containing 10 A.; lot No. 772, containing 37 A. 1 R. 5 P.; lot No. 741, containing 36 A. 3 R. 18 P.; lot No. 700, containing 36 A. 1 R. 23 P.; lot No. 669, containing 37 A. 38 P.; part of lot No. 701, on north side of said lot, containing 30 A. 2 R. 28 P.; part of lot No. 843, to be surveyed off of west end of said lot, containing 16 A., amounting in all, according to Hill's survey, — 300 A. 16 P., valued at $11,535.93.

1082

To John A. Erwin, guardian for Lewis T. Erwin, minor distributee, was assigned and distributed the following city property in Cartersville to make him about equal with the more advanced distributees:

1 dwelling and lot in Cartersville, containing 4 A. 2 R. 26 P., valued at	$3,250 00
1 brick store-house and lot, now occupied by L. Myer, in Cartersville, value	2,500 00
Also the undivided one-half interest in brick store-house and lot on south side Main street, in Cartersville, now occupied by S. & M. Seibman, value	1,800 00
Total value	$7,550 00

To F. P. Gray, guardian for Cora Gray, minor distributee, was assigned and distributed the following city property in Cartersville:

The dwelling and lot now occupied by F. P. Gray, valued at	$3,000 00

And by consent of the distributees the following amount in money was assigned to make her about equal with more advanced distributees:

1083

Money assigned	7,655 82
Making total	$10,655 82

Recapitulation and Statement of the Standing of Distributees with the Estate of Deceased.

Mary L. Tumlin, widow:

To assignment and distribution	$24,002 50
Maximum distributive	24,000 00
Due estate	2 50

Ada S. Rice:

To advancement by deceased	$13,125 00
" distributive share No. 5	11,500 00
	$24,625 00
Maximum of distribution	24,000 00
Due estate	625 00

Napoleon Tumlin:

To advancement by deed	$8,605 00
" " " adm'rs	3,706 47
" distributive share No. 2	11,541 90
	23,853 37
Maximum distribution	24,000 00
Due from estate	$146 37

Lula T. Lyon:

To advancement by deceased	$12,044 07
" " " adm'rs	364 90
" distributive share No. 6	10,614 27
	23,023 24
Maximum distribution	24,000 00
Due from estate	$976 76

1084 F. P. Gray, guardian Cora Gray:

To advancement by adm'rs	1,764 93
To town property assigned	3,000 00
" cash "	7,655 82
" distributive share No. 1	11,579 25
	$24,000 00
Maximum distribution	24,000 00

John A. Erwin, guard. Geo. H. Tumlin:

To advancement by adm'rs	$861 20
" land assigned	11,535 93
" distributive share No. 4	11,572 87
	$23,970 00
Maximum distribution	24,000 00
Due from estate	$30 00

John A. Erwin, guard. L. T. Erwin:

To advancement by deceased	$4,000 00
" " " adm'rs	499 75
" dwelling-house and lot assigned	3,250 00
" 1 brick store " " "	2,500 00
" half " " " " "	1,800 00
" distributive share No. 3	11,559 31
	$23,609 06
Maximum distribution	24,000 00
Due from estate	390 74

From foregoing:

Mary L. Tumlin owes est. of deceased		$2 50
Ada S. Rice		625 00
	Napoleon Tumlin is due from dec'd est.	146 63
1085	Lula T. Lyon is due from dec'd est.	$976 76
	F. P. Gray, guard. for C. Gray	000 00
J. A. Erwin, guard. for G. H. Tumlin, is due from dec'd est.,		30 00
J. A. Erwin, " L. T. Erwin, " " " " " "		390 94

Which is respectfully submitted Oct. 11, 1875.

S. DISHROON,
N. GILREATH,
JOHN S. LEAK,
J. J. HOWARD,
W. W. RICH,
Freeholders & Commissioners.

GEORGIA, *Bartow County:*

Personally appeared before me Nelson Gilreath, John J. Howard, J. S. Leake, S. Dishroon, and W. W. Rich, who, being duly sworn, depose and say that they will fairly and faithfully, justly, to the best of their ability and judgment, divide and distribute amongs the seven distributees of the estate of Lewis Tumlin, late of said county, deceased, the lands and city property in Bartow county of said estate that may be shown to us for that purpose by the administrators of said estate, and a true return make of the same to the

ordinary of said county, in compliance with his order directed to us for that purpose.

J. J. HOWARD.
S. DISHROON.
JOHN S. LEAKE.
W. W. RICH.

Sworn to and subscribed before me this 2d day of October, 1875.
W. H. HOWARD,
Not. Pub. B. C.

1086 Recorded Nov. 5, 1875.
J. A. HOWARD, *Ordinary.*

Supplemental Return of Commissioners to Divide Estate of Col. Lewis Tumlin, Deceased.

To Frank P. Gray, guardian for Cora Gray, minor distributee, was assigned and distributed the following property to make her equal to advanced distributees:

One dwelling-house and lot, now occupied by Frank P. Gray, valued at	$3,000 00
Balance in cash	9,420 75
Total	$12,420 75

N. GILREATH,
W. W. RICH,
J. J. HOWARD,
S. DISHROON,
J. S. LEAKE,
Commissioners.

Recorded Feb'y 22d, 1876.
J. A. HOWARD, *Ordinary.*

Application to Make the Return of the Commissioners to Divide the Estate in Kind the Judgment of Court.

Court of Ordinary, Bartow Co. Regular Term, Nov. 1, 1875.

FRANK P. GRAY & JOHN A. ERWIN Adm'rs Est. Lewis Tumlin, Dec'd.

Whereas, at the September term, 1875, of this court, com-
1087 missioners were appointed to divide the estate lands belonging to Lewis Tumlin, deceased, situated, lying, and being in the county of Bartow, among the distributees of said deceased; and whereas said commissioners have made return of their action in the premises to this court, and no objection being filed by any of the parties interested, it is ordered by the court that the return of said commissioners be and the same is made the judgment of the court, and is hereby ordered to record.

Granted in open court, Nov. term, 1875.
J. A. HOWARD, *Ordinary.*

Application to Have Supplemental Return of Commissioners to Divide Estate Made the Judgment of Court and Recorded.

Court of Ordinary, Bartow Co. Regular Term, Dec. 6, 1875.

F. P. GRAY and JOHN A. ERWIN, Adm'rs Est. Lewis Tumlin, Dec'd.

Upon considering the above application, ordered by the court that said supplemental return be, and the same is hereby, made the judgment of the court, and that the same be recorded.

Granted in open court, Dec. term, 1875.

J. A. HOWARD, *Ordinary.*

STATE OF GEORGIA, *Bartow County:*

I, J. A. Howard, ord'y in and for said county, do hereby
1088 certify that the above and foregoing contains a full, true, and complete copy of the distribution of the estate of Lewis Tumlin, deceased, in kind, and the orders admitting same to record, as appears of record in the ordinary's office of said county.

Witness my hand and seal of office this 20th April, 1882.

J. A. HOWARD, *Ordinary.*

1089 EXHIBIT "S."

Application for Time to Make Annual Return.

Court of Ordinary, Bartow Co., Ga. Regular Term, July 2nd, 1877.

F. P. GRAY, Adm'r Est. Lewis Tumlin, Dec'd.

It appearing to the court that the business of said estate is such that said administrator cannot make his annual return to-day ordered that he be, and is hereby, allowed further time, until the first Monday in August, to make his annual return for 1876, and that he be saved forfeiture of commissions on the same.

Granted in open court, July term, 1877.

J. A. HOWARD, *Ordinary.*

A true extract from the minutes.
May 27th, 1882.

J. A. HOWARD, *Ordinary.*

1090 EXHIBIT "T."

Application to Save Forfeiture of Commission on Annual Return for the Year 1876.

Court of Ordinary, Bartow County, Ga. Regular Term, August 6th, 1877.

F. P. GRAY, Adm'r Est. Lewis Tumlin, Dec'd.

Upon considering the above application, and it appearing to the court that said administrator was prevented from making his annual return for 1876 on said estate by the business of the estate requiring

his time to prepare case of said estate for July term of Bartow superior court, ordered that he be, and is hereby, saved forfeiture of commissions on the return this day filed for said year.

Granted in open court, Aug. term, 1877.

J. A. HOWARD, *Ordinary.*

A true extract from the minutes.
May 27th, 1882.
[SEAL.] J. A. HOWARD, *Ordinary.*

1091 EXHIBIT "U."

GEORGIA, *Bartow County:*

To the Hon. J. A. Howard, ordinary of said county:

The petition of F. P. Gray, adm'r of Lewis Tumlin, late of said county, deceased, respectfully shows unto your honor that he has been confined for a week past to his room with fever; in consequence thereof — has been unable to finish his annual return by July 1st as adm'r of Lewis Tumlin, deceased; and he further shows that the superior court of said county will be in session from the 2nd Monday in July until beyond the first Monday in August, and he will not — able to get said return ready before the first Monday in Sept. Wherefore petitioner prays the court to grant until first Monday in Sept. to make said return.

F. P. GRAY, *Adm'r.*

Upon considering the above application, ordered that said F. P. Gray, adm'r, have leave to file his annual return by the first Monday in Sept. next, and be saved the forfeiture of commissions on the same.

Granted in open court, July term, 1879.

J. A. HOWARD, *Ordinary.*

A true extract from the minutes.
May 27th, 1882.
[SEAL.] J. A. HOWARD, *Ordinary.*

1092 EXHIBIT "V."

Application for Time to Make up Annual Return.

Court of Ordinary, Bartow Co., Ga. Regular Term, July 4th, 1881.

F. P. GRAY, Adm'r Est. Lewis Tumlin, Dec'd.

Upon considering the above application of Frank P. Gray, adm'r of Lewis Tumlin, dec'd, ordered that he be allowed until the first Monday in August, 1881, to file his annual return as such administrator, and that he be saved the forfeiture of his commissions.

Granted in open court July term, 1881.

J. A. HOWARD, *Ordinary.*

A true extract from the minutes.
May 27th, 1882.
[SEAL.] J. A. HOWARD, *Ordinary.*

1093 EXHIBIT "W."

Court of Ordinary, Bartow Co., Ga. Regular Term, Sept. 5th, 1881.

Frank P. Gray, adm'r of Lewis Tumlin, deceased, having filed his annual return for 1880, and showing to the court that the condition of the estate was such that he could not file the return sooner, ordered that the same be filed, and that he be saved forfeiture of commission on the same.

Granted in open court Sept. term, 1881.

J. A. HOWARD, *Ordinary.*

A true extract from the minutes.
May 27th, 1882.
[SEAL.] J. A. HOWARD, *Ordinary.*

1094 EXHIBIT "X."

GEORGIA, *Bartow County:*

To the Hon. J. A. Howard, ordinary of said county:

The petition of Frank P. Gray, adm'r of the estate of Lewis Tumlin, respectfully showeth to your honor that he has been engaged in making a settlement with most of the heirs of the estate aforesaid; that he has been compelled to devote considerable time to preparation for the July term of Bartow superior court, and for these reasons has been unable to get his return as adm'r ready by the first of July for the previous year; that July court will commence the second Monday in July and will extend beyond the first Monday in August, and your petitioner will be engaged in court so as to prevent him from making said return for the first Monday in August; wherefore your petitioner prays that he may have until the first Monday in September within which to file said return.

FRANK P. GRAY.

Filed in office July 4th, 1881.

J. A. HOWARD, *Ordinary.*

GEORGIA, *Bartow County:*

I, J. A. Howard, ordinary in and for said county, do hereby certify that the foregoing is a full, true, and complete copy of the application of F. P. Gray, adm'r of Lewis Tumlin, deceased, for time to make annual return as appears of file in the ordinary's office of said county.

Witness my hand and seal this Sept. 11, 1882.
[SEAL.] J. A. HOWARD, *Ordinary.*

1095 EXHIBIT "Y."

STATE OF GEORGIA, *Bartow County:*

To the honorable court of ordinary of said county:

The petition of William T. Wofford, Noah King, Edwin M. Price, W. W. Rich, & James C. Wofford, securities on the bond given by

F. P. Gray for the due and faithful administration of the estate of Lewis Tumlin, deceased, showeth that they conceive themselves in great danger of suffering loss by reason of said suretyship on the following grounds, to wit:

1st. Because said F. P. Gray, adm'r, &c., did expose to sale publicly on the first Tuesday in June, 1876, the mill property belonging to said estate on the Etowah river near Cartersville, when it was bid off by Thomas J. Lyon, who offered to comply fully with the terms of the sale by paying the amount required, to wit, ¼ cash and giving good notes, with N. Tumlin, N. Gilreath, and Thos. Tumlin sec'y, said bid being $2,000.00, which tender said Gray refused to accept, but ordered the property to be again sold, when it was bid off by Thomas Tumlin for Lula Lyon, one of the heirs of L. Tumlin, deceased, for $1,999.00, when said Gray refused to give said bidder time to comply with the terms of the sale and ordered the property sold the third time, when it was bid off by F. M. Ford, for the use and benefit of said Ford and said Gray, for the sum of
1096 $1,300.00, said Ford giving notes with securities not worth so much as the note tendered by Thos. Lyon, said last-mentioned sale being made after sale hours, said property having been appraised at $7,000.00, which conduct, as well as the other acts hereinafter charged against said Gray, was a fraud upon those interested in said estate.

2nd. Said Gray, as adm'r, held a note of Cook & Cheek for $15,000.00, due January 1st, 1876, and instead of enforcing the payment of the same, as he might have done, made a new contract and granted said Cook & Cheek longer time of payment, until they went into bankruptcy, to the great injury of said estate or the securities of said Gray.

3rd. Because he charged $3,000.00 as commissions for the division of the home tract of land.

4th. Because he charges said estate, in vou. #158, with $164.85 interest on the amount of cash allowed Mrs. Cora Gray; said amount set apart was in the hands of the administrators, and they had no right to delay the payment or to charge the estate as aforesaid.

5th. In paying J. A. Thompson's account, vou. #141, and $400.52, said account being barred by the statute and said Thompson being indebted by note to Lewis Tumlin in the meanwhile.

6th. Because vou. #144, for $49.60, is not signed by any one.

7th. Because expense account is not proven by vou's or
1097 otherwise, same being for $209.81 up to return in April, 1876.

8th. Because the large oat crop as appraised is nowhere accounted for; said crop made in 1875.

9th. Because vou. #27, for $34.50, paid J. A. Stover, is for lightning rods on Mrs. Cora Gray's property and not chargeable to the estate.

10th. Because said Gray, just before a sale of the personal property of said estate, let out in the woods a lot of hogs belonging to said estate, which were then sold with the statement that the purchaser would take the chances, and said Gray bought them at less than half their value.

11th. Because he sold to A. M. Franklin 18 cords of wood belonging to the estate and has not accounted for it in his return to the ordinary.

12th. Because in vou. # 55 he charges the estate with $1,500.00, when the voucher is for $15.00.

13th. Because he appropriated to his own use the rents of the Creswell place, belonging to said estate, for the year 1875, being about 24 bales of cotton, worth $1,200.00.

14th. Because he neglected to gather all the cotton crop in the fall of 1875, but let the stock run upon the field while there was about four bales unpicked and in the meanwhile carried the wagons and hands off to do hauling for himself individually.

1098 15th. Because his return in April, 1876, shows cash on hand $2,616.20, when he had cash belonging to said estate amounting to more than $6,600.00.

16th. Because said Gray sold publicly on 1st Tuesday in November, 1876, a tract of land, being 30 acres, more or less, with improvements, lying near Cartersville, which J. W. Clayton held under bond for title, and the judgment belonging to said estate amounted to $2,000.00 or more, said property being worth $2,500.00, but was sold as aforesaid for no legal reason or necessity for the sum of $600.00, and bought by the said Gray or for his use and benefit.

17th. Because, on account of said acts as well as on account of the youth, inexperience, extravagance, and reckless conduct of said Gray, your petitioners apprehend future loss and trouble.

Wherefore your petitioners pray that said F. P. Gray be notified to appear at the court of ordinary for said county on 1st Tuesday in April next and show cause why said petitioners should not be released from their securityship for said Gray as aforesaid.

This March 22, 1877.

WOFFORD & NEAL,
GEO. C. TUMLIN,
Pet'rs Att'ys.

Filed in office March 23, 1877.

J. A. HOWARD, *Ordinary.*

1099 *Motion for Relief.*

W. T. WOFFORD *et al.*, Securities, *vs.* F. P. GRAY, Adm'r.

The defendant, Frank P. Gray, is hereby notified and cited to be and appear at a court of ordinary in and for Bartow county, to be held at Cartersville, on the first Monday in — next, by 10 o'clock a. m., to show cause, if any he can, why his securities shall not be discharged from liability on adm'r's bond, as prayed for in the foregoing petition.

Given under my hand and official signature March 23, 1877.

J. A. HOWARD, *Ordinary.*

Served the defendant, F. P. Gray, in person with a copy of the within this 23r- March, 1877.

JAMES KENNEDY,
Deputy Sheriff.

Application by Securities on Administrator's Bond to be Relieved.

In Court of Ordinary, Bartow County.

WILLIAM T. WOFFORD, JAMES C. WOFFORD, & W. W. RICH
vs.
FRANK P. GRAY, Adm'r of Lewis Tumlin, Dec'd.

Now comes the said Frank P. Gray, administrator of Lewis Tumlin, deceased, and in answer to said application says that each
1100 and every ground stated and set out in said application is incorrect and without foundation in fact; but that, recognizing the right of said applicants to be relieved from any further liability on said bond at their will and pleasure, said Gray hereby consents that an order be passed relieving said securities and requiring said Gray to execute a new bond.

WARREN AKIN & SON,
STANSEL & WOFFORD,
A. JOHNSON,
Att'ys for F. P. Gray.

Application for Relief of Sureties on Administrator's Bond.

Court of Ordinary, Bartow County. Regular Term, Oct. 1, 1877.

W. T. WOFFORD *et al.*, Sureties,
vs.
F. P. GRAY, Adm'r Lewis Tumlin, Dec'd.

Whereas William T. Wofford, James C. Wofford, & William W. Rich, three of the sureties on the bond of Frank P. Gray, administrator on the estate of Lewis Tumlin, deceased, having applied to be discharged from future liability as sureties on the said bond of the said Frank P. Gray, as administrator as aforesaid, and having withdrawn all the charges made in the particular grounds stated in said application, and insisting that they, as matter of right, as the sure-
ties of Frank P. Gray on his bond as administrator on the
1101 estate of the said Lewis Tumlin, deceased, are entitled to relief by being discharged from all future liability as securities of the said Frank P. Gray, and that he be required to give new bond and security as administrator on said estate; and the said Frank P. Gray having been served with said application and showing no cause against the discharge of the said William T. Wofford, James C. Wofford, and William W. Rich as sureties on his said bond, and consenting that they, as matter of right, be discharged from liability on his said bond according to law, it is, therefore, ordered, considered, and adjudged by the court that the said William T. Wofford, James C. Wofford, and William W. Rich be, and they are hereby, discharged upon and when the said Frank P. Gray shall give new bond and security, to be approved of by the ordinary, in the sum of one hundred and forty thousand dollars; and it is further ordered that said new bond and security be given, approved, and filed by the 20th day of October, 1877 (including the 20th), and when said

new bond and security is so given, approved, and filed, then the said William T. Wofford, James C. Wofford, & William W. Rich be discharged from all future liability as sureties for the said Frank P. Gray, as administrator as aforesaid; and it is further
1102–1118 ordered and adjudged that said Frank P. Gray pay the costs of this application.

Costs, ordinary's	$10 90
Sheriff	2 00
Witness Carson	3 00
	$15 90

Granted in open court, October term, 1877.

J. A. HOWARD, *Ordinary.*

STATE OF GEORGIA, *Bartow County:*

I, J. A. Howard, ordinary in and for said county, do hereby certify that the above and foregoing eight pages contain a full, true, and complete copy of the application to be discharged by the securities and plea and order of discharge as appears of file and recorded on the minutes of the court of ordinary of said county.

Witness my hand and seal of office this June 8th, 1882.

J. A. HOWARD, *Ordinary.*

* * * * * * *

1119 *Oral Evidence on Question of Validity of Bond of Gray & Erwin.*

Dr. W. L. Benham sworn: My name is next to the largest one on the bond; all the other names were signed to the bond when witness signed it except name of Thomas Tumlin, and I know of no invalidity in the other signatures; don't remember all the other names to the bond; don't recollect seeing names of H. C. Erwin, Ramsaur, J. G. B. Erwin on it; saw that some of the names were signed by att'y, but I did not inquire whether the signatures were genuine nor as to the authority of agents who signed.

J. J. Howard, sworn, says: I signed the bond for myself, Rogers, and Mitchell. At Erwin's request I went to see Rogers and showed him the list of the names of the persons who were to go on the bond, said names being part of the names now on the bond. Rogers signed the power of att'y afterwards when he came to town and I signed the bond. Erwin asked me to see Rogers to go on his bond. At that time I did not know that said persons, a list of whose names I showed Rogers, would go on said bond.

Rob-rt L. Rogers: I came to Cartersville to sign the bond. I agree with Mr. J. J. Howard's statement above shown. J. A. Erwin,
1120 before I signed the power of att'y, said that those men would go on the bond. I never read the power of att'y; did not think it necessary, as I had confidence in Erwin; I could have read it, but did not have my spectacles.

This evidence by Rogers being objected — the objection was sustained.

A. C. Trimble sworn: I signed by Gen'l Wofford. The names on the bond were mentioned to me on going on the bond. The whole list of bondsmen encouraged me to go on it.

All excepted to and ruled out.

James M. Veach: I signed by att'y; I had been furnished with the names of the bondsmen, and I especially instructed —— —— not to use the power of att'y unless the others signed, including *the* Erwin, Ramsaur, &c. I instructed Gray not to sign my name unless others signed. I handed the power of att'y to the Grays. (It was the understanding that these other names were to go on the bond.)

This excepted to and ruled out.

Complainants put J. A. Howard, the ordinary of Bartow county, and who was ordinary in 1875, when Gray & Erwin gave the bond in controversy, who testified: There was no agreement or understanding in my presence, or with me when one of the securi-
1121 ties on said bond signed it, that certain other names were to go on it. Witness did not know who were to be on the bond till it was returned to me in the office.

The bond was executed in my office and in my presence. I did not any time bring the power of attorney to Erwin's store; think these powers of att'y were in same condition when brought to my office as they now are—that is, altered by erasures and by writing, as they now appear; can't say positively they were then in that condition. Erwin may be mistaken. I did not carry the powers of att'y to his store.

Gen'l W. T. Wofford sworn on behalf of def'ts: I acted as att'y-in-fact for Veach & Trimble. Frank Gray got up a list of names to go on the bond, and I showed the list to Veach & Trimble. These names included Stokley, Rogers, Howard, Ramsaur, the two Erwins, Thos. Tumlin. I was instructed not to sign these names unless others signed.

Cr.-ex.:

I sent by Frank Gray a list of the names to Veach & Trimble; don't know what Gray told them, except what Veach told me. These matters were between me, Gray, and Veach *et al.* When I signed the bond I did not know that the Erwins & Ramsaur had not signed.

J. B. Conyers, sworn, says: John S. Leake, one of the sureties, is a brother to the wife of J. A. Howard, ordinary. Said Howard's wife is still in life.

1122 Counsel for receiver put in evidence certified copies of the powers of att'y given, respectively, by J. G. B. Erwin, H. C. Erwin, & L. R. Ramsaur to Henry C. Ramsaur, appointing him to sign their names, respectively, as surety on a bond to be given "by J. A. Erwin & F. P. Gray, adm'rs." This is the language of the copy powers of att'y.

The original powers of att'y appear to have been written thus: "Bond to be given by J. A. Erwin, as one of the adm'rs." He —;

but the words "is one of the" are erased, and in their place the words "& F. P. Gray" inserted.

Answers to int'g's by J. A. Howard put in evidence by the receiver.

E. N. BROYLES,
Special Master.

1123 UNITED STATES OF AMERICA,
Northern District of Georgia:

In the Circuit Court of the United States for the Northern District of Georgia.

To —— ——:

Whereas there is a certain matter in controversy now pending and to be tried in the said circuit court between James L. Rice and wife and Frank P. Gray *et al.;* and

Whereas John A. Erwin is a material witness in said suit in behalf of the def'd'ts and cannot attend said circuit court in person without manifest inconvenience:

Now know ye that, reposing special trust and confidence in your prudence and fidelity, you are hereby appointed, and you, or any two or more of you, are hereby authorized and required to cause the said John A. Erwin personally to come before you and, after being duly sworn, to examine him concerning the said suit, agreeably to the interrogatories hereunto annexed; and the answers to the same being plainly and distinctly written, you are to send the same, together with this writ, closed up under your hands and seals, to the clerk of said court at Atlanta, Ga., on or before the 2d Monday in October, 1883, when and where the next term of said court will be held.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this twenty-seventh day
1124 of September, 1883.

[SEAL.] A. E. BUCK, *Clerk.*

Copy.

GEORGIA, *Gordon County:*

Know all men by these presents that I, John G. B. Erwin, of the county and State aforesaid, do hereby appoint Henry C. Ramsaur, of the county of Bartow and State aforesaid, my lawful attorney to sign my name as security on a bond to be given by J. A. Erwin & F. P. Gray, as one of the administrators on the estate of Lewis Tumlin, late of Bartow Co., dec'd, for six hundred thousand dollars, for the purpose therein expressed in said bond; and my name so signed under this power of attorney shall be as binding on me as if I had personally signed the same.

J. G. B. ERWIN.

This 22d July, 1875.
A. J. HUTCHISON, *J. P.*

Recorded in book of bonds, page 341, August 4th, 1875.
J. A. HOWARD, *Ordinary.*

1125 *Bill for Account, &c.*

In the Circuit Court of the U. S. for the Northern District of Ga.

JAS. L. RICE & WIFE *v.* FRANK P. GRAY, N. B. TUMLIN, *et al.*

Interrogatories to be propounded to John A. Erwin, a material witness for the defence, who resides in Rhea county, Tennessee, near Rhea Springs.

1. Where did you formerly reside? Where do you reside now?

2. What relation did you bear to the estate of Lewis Tumlin, dec'd, of Bartow county? If you answer that you were administrator, state how long you remained administrator. How did you cease to be administrator?

3. What connection, if any, did H. C. Erwin and J. G. B. Erwin have with your administration of that estate? If you state that they were sureties on your bond, state how they came to be such sureties.

4. Look at the annexed copy power of attorney, marked "A," and state whether or not both M. G. & J. G. B. Erwin signed the same sort of power of attorney. State whether or not the same interlineation- and erasure- were made in the power of attorney signed by each. Who, if any one, signed the same sort of power of attorney
1126 at the same time? Where were these three powers of attorney signed, at Cartersville or elsewhere?

5. Who made the interlineation- and erasures in said power of attorney?

6. State whether those interlineations and erasures were made before or after the signing of said power of attorney. If after, how long after?

7. How came the erasures and interlineations that appear to have been made in the power of attorney of H. G. Erwin & J. G. B. Erwin and M. Ramsaur to be made? Who suggested it to you?

8. When these erasures and interlineations were made was either H. C. or J. G. B. Erwin present, or did they or either of them authorize it?

9. Do you know or can you set forth any other matter or thing which may be of benefit or advantage to the parties at issue in this cause or either of them, or that may be material to the subject of this your examination, or the matter in question in this cause? If yes, set forth the same fully and at large in your answer.

MYNATT & HOWELL,
Att'ys for Erwin.

1127 *Cross-Interrogatories for J. A. Erwin.*

1st X Interrogatory. If in answer to the 5th direct interrogatory you state that alterations were made in the presence of attorney referred to, state when they were made, in what room or house, who did it, and who was present. Was it done before or after the execution of the bond?

6th X Interrogatory. If in any of your answersyou state that you altered their power of attorney or knew of its being done, state whether or not you informed H. C. Erwin, J. G. B. Erwin, or L. R. Ramsauer of the fact. When did you inform them? What did they say in reply? Did they object to it?

7th X Interrogatory. What relation are you to each of them?

8th X Interrogatory. What relation is H. C. Ramsauer to them and to each of them, and how are they related to each other? How — you?

9th — Interrogatory. Was H. C. Ramsauer your partner or clerk or either at that time?

10th. How long have you resided in Bartow county?
1128 Had you not done so for many years? Were you not well known to them and each of them, both in Georgia and North Carolina?

10th Int. Was not the estate of Lewis Tumlin notoriously known to each of them to be the largest or one of the largest left in that region for many years?

11th. While you were acting as administrator did you not tell them, each of them, that you and Gray had obtained joint administration on Tumlin's estate? Did you not tell them that you had qualified and been acting? Did you not meet them often while you were administrator?

12th. Did they not know that they were your sureties? Did you not tell them so? Did they not know that their names had been signed to the bond, and what sort of bond? Did you not tell them? What did they say? Did they object? Did they not know of the alteration, if any? Did you not tell them? Do you not know that H. C. Ramsauer told them?

13th. Did they not write to you, about the last of 1880 or first of 1881, that they had been sued by Mrs. Lyons on this bond in
1129 Bartow superior court? Have you their letters? Annex them, if you have; if you have not or cannot do so, state why not.

14th. After that suit was brought did you not come to Bartow county to see about it? Did you visit or meet them or either of them? Did they not know that they were sued on this bond then? Was not this alteration talked of and spoken of at that time?

15th. Did they ever in any way complain of it at any time, and did not they know at the time you were acting as administrator that you *was* acting jointly with Gray, and that they were sureties on your administration bond?

GRAHAM & GRAHAM,
Sol'rs for Compl'ts.

1130 *Answers to Inter'g.*

STATE OF TENNESSEE, *County of Rhea:*

In the Circuit Court of the U. S. for the Northern District of Georgia.

JAMES L. RICE & WIFE
vs.
FRANK P. GRAY, N. B. TUMLIN, *et al.*

Bill for account, &c.

By virtue of a commission issuing out of the honorable circuit court of the United States for the northern district of Ga., to us directed, we have caused John A. Erwin, the witness in said commission named, to come before us, and being duly sworn true answers to make to the interrogatories to said commission annexed, deposes and says as follows:

To 1st int'y he answers; He formerly resided at Cartersville, Ga.; resides now at Pin Hook Landing, Tennessee.

To 2d int'y he answers that he was one of the adm'rs; acted as such from Aug., 1875, to May, 1876—about nine months. He resigned the administration and was discharged by the court of ordinary of Bartow Co., Ga.

1131 To 3d int'y he answers that they were securities on his bond as adm'r; at his, deponent's, solicitation they signed power of attorney authorizing H. C. Ramsaur to sign their names to the bond.

To 4th int'y he answers that H. C. & J. G. B. Erwin signed, he thinks, the same kind of power of att'y, and that L. R. Ramsaur signed a similar one, and that the same interlineations were made in each. All three of the powers of att'y were signed at Fair Mount, Gordon Co., Ga.

To 5th int'y he answers that he, deponent, made them.

To 6th int'y he answers: They were made after they were executed and some days or weeks after the adm'r bonds were made.

To 7th int'y he answers: That some days, or perhaps two or more weeks, after the making of the bond as adm'rs the ordinary, J. J. Howard, bought the power of att'y to his, deponent's, store and said they were informal and must be corrected before he could

1132 place them on record, or something to that effect; that both of the adm'rs' names must appear in powers of att'y; that F. P. Gray's name, the other adm'r, must also appear in them, having told each of the parties who the other adm'r was to be, and regarding it only as an informality and not changing the liabilities of any of the parties in the least. I made the change in the presence of the ordinary, and so little importance did I attach to it that it never occurred to my mind since the moment it was done until very lately my attention was called to it by J. G. B. Erwin. No thought of wrong or changing the liabilities of the parties occurred to his mind in the slightest. He did not know at that time that separate bonds could be given in an administration, never before having been connected with business of an adm'r of an estate.

To 8th int'y he answers: Neither of the parties were present or authorized the change.

To 9th int'y he answers: He remembers nothing further.

To 1st X int'y he answers: The alterations were made in his storehouse in Cartersville, Ga. He, deponent, did it under the impressions stated in 7th direct int'y. Judge J. A. Howard, ordinary, was present. It was done after the bond was executed.

1133 To 6th X int'y he answers: That, as stated in 7th direct int'y, the alterations entirely escaped his mind from the time it was done until recently. Consequently he never mentioned it; would have done so had he ever thought of it in their presence.

To 7th X int'y he answers: Second cousin to H. C. & J. G. B. Erwin; bro.-in-law of L. R. Ramsour.

To 8th X int'y he answers: H. C. Ramsour is distantly related to the Erwins and son of L. R. Ramsour. H. C. & J. G. B. Erwin are brothers; answered in 7th X int'y.

To 9th X int'y he answers: H. C. Ramsour was his partner at that time in business. Deponent lived some thirty years in Bartow, Ga., but not in N. C.

To 10th X int'y he answers: Perhaps it was.

To 11th X int'y he answers: Don't remember of ever talking to either of the parties about the estate of Tumlin after he was

1134 qualified until he was discharged; did not meet them often while he was adm'r.

To 12th X int'y he answers: He presumes they knew they were his securities; don't remember telling them so; presume they did. He told them the powers of att'y were made, of the probable size of the bond; presume I did; don't remember what they said. They did not, as he remembers, object: do not know; did not. H. C. Ramsour may have told them; don't know.

To 13th X int'y he answers: He has no recollection of their writing him; has no letter from them; cannot annex them, not knowing any.

To 14th X int'y he answers: That he did; did not see either of these parties, as he now remembers, while on that visit or communicate with them.

To 15th X int'y he answers: They never complained to him; don't know what their impression was about the administration, whether they regarded it joint or separate administration, as stated in his answer to 7th direct int'y. He informed them before

1135 and at the signing of the powers of att'y that F. P. Gray was to be the other, and perhaps Mr. J. L. Rice, of Nashville, would be another. His thought was joint adm'r, and didn't mean to have them think it was separate, but he does not know what their impression was. He had no more thought of doing an error by inserting the name of F. P. Gray than he would have had of inserting the date had it been omitted, he having told each of the parties that Gray was to be the other adm'r and the alterations only intended to make them formal, as was suggested by the ordinary.

J. A. ERWIN.

Answered, sworn to, and subscribed before me this fifteenth day of Oct., 1883.

J. H. COUCH, [L. S.]
Commissioner.
J. H. HALE, [L. S.]
Commissioner.

1136 UNITED STATES OF AMERICA,
Northern District of Georgia:

In the Circuit Court of the United States for the Northern District of Georgia.

To J. D. Tinsley, W. R. Rankin:

Whereas there is a certain matter in controversy now pending and to be tried in the said circuit court between James L. Rice and wife and Frank P. Gray *et al.;*

And whereas J. G. B. Erwin and H. C. Erwin are material witnesses in said suit on behalf of the def'd'ts and cannot attend said circuit court in person without manifest inconvenience:

Now know ye that, reposing special trust and confidence in your prudence and fidelity, you are hereby appointed, and you or any two or more of you are hereby authorized and required to cause the said J. G. B. Erwin and H. C. Erwin personally to come before you, and, after being duly sworn, to examine them concerning the said suit agreeably to the interrogatories hereunto annexed; and, the answers to the same being plainly and distinctly written, you are to send the same, together with this writ, closed up under your hands and seals, to the clerk of said court, at Atlanta, Ga., on or before the 2d Monday in October, 1883, when and where the next term of said court will be held.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this twenty-seventh day of September, 1883.

[L. S.] A. E. BUCK, *Clerk.*

1137 *Bill.*

In Circuit Court of U. S. for Northern District of Georgia.

J. L. RICE & WIFE *vs.* F. P. GRAY *et al.*

Interrogatories to be propounded to H. C. Erwin and J. G. B. Erwin, material witnesses for the defence, who resides at Fairmount, in Gordon county, Ga.

1. Where do you reside? Where did you reside when Jno. A. Erwin made bond as administrator of the estate of Lewis Tumlin, deceased?

2. What relation are you to Jno. A. Erwin?

2. Look at the annexed copy, power of attorney, signed J. G. B. Erwin, and state whether or not each of you signed a power of attorney similar to that, at what place you signed, and at whose instance, and the circumstances. Who wrote the original powers of attorney that each of you signed?

4. Let each one of you examine the annexed copy, power of attorney, marked ("A"), and compare it with the original power of attorney as you signed it and state, if any, what changes were made after you signed it.

5. If you state that any changes were made after you signed, respectively, the powers of attorney made by each of you, state whether or not those changes were made with your consent or by your authority.

6. When did you first learn that those changes had been
1138 made? State the facts that led to your knowledge of the erasions and interlineations, and what, if any, other power of attorney was signed at the same time and place.

7. Do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause or either of them, or that may be material to the subject of this your examination, or the matters or questions in this cause? If yea, set forth the same fully — at large in your answer.

MYNATT & HOWELL,
Sols. for Erwins.

Cross-Interrogatories for H. C. Erwin and J. G. B. Erwin—to Each of the Witnesses.

1st X Interrogatory. If you answer that the powers of attorney inquired about were altered after you signed them, were you not informed of it soon after it was done? Did not John A. Erwin tell you it had been done? Did he conceal it from you? Did not H. C. Ramsouer tell you it had been done? Did he conceal it?

2d X Int. Did not John A. Erwin tell you that he and Gray had obtained letters of administration on Tumlin's estate? Did you not know they had done so? Did you not see John A. Erwin
1139 after his appointment and while acting as administrator after? Did you not know he with Gray were winding up that estate?

3d X Int. How often did you see Erwin, J. A., between 2d August, 1875, and 2d May, 1876? Did you hear him speak of this administration? Did you not know you were on his bond? Did you not know that Gray was also acting?

4th X Interrogatory. When did you first learn that you were sureties on this administration? Have you not known it all the time?

5th X Int'y. When informed that both were acting as administrators, did you or not inquire as to how you came on the bond and and what bond you were on?

7th X Int'y. Did you not know that you were sureties on the administration bond of — Tumlin estate; that it was for $600,000.00, and that Gray and Erwin were the administrators, and did you not know that your name had been signed to it by Ramsouer and consider it all right?

8th X Int'y. Did you ever complain of it?

9th X Int'y. Look at the printed paper hereto attached, containing 24 pages of printed matter, and state whether or not any such

paper was ever served on you. When was it? Was it not in December, 1880? Did you read it?

1139*a* EXHIBIT B.

STATE OF GEORGIA, *Bartow County:*

To the Hon. C. D. McCutchen, judge of the superior court of said county.

Respectfully complaining, showeth unto your honor your oratrix, Lula T. Lyon, who brings this bill against the defendants hereinafter named, the following facts, to wit:

That on the 2d day of June, 1875, Lewis Tumlin, of said county, died intestate, leaving as his heirs-at-law his widow, Mary L. Tumlin, now Mary L. Spencer; his sons, Napoleon B. and George H. Tumlin; his daughters, your oratrix, the said Lula T. Lyon, formerly Lula Tumlin; Ada S. Rice, formerly Ada S. Tumlin; Cora M. Gray, formerly Cora M. Tumlin, and Lewis T. Erwin, the son of a deceased daughter, each of whom became, upon his death, entitled to an undivided seventh part of his estate, his widow having, after his death, elected to take that in lieu of dower.

That his estate, at the time of his death, consisted of several large and valuable tracts of land in said county of Bartow and in other counties in said State; a farm in the State of Alabama; city property in the city of Cartersville, in said county; many wild lots of land in said county and in the counties of Cherokee, Polk, and other counties in said State; personal property of almost every kind and description; ready money, bank stock, mortgages, notes, accounts, and other assets, rights, and credits of the aggregate value of about three hundred and sixty thousand dollars.

That immediately after the death of said Lewis Tumlin one Frank P. Gray, who had intermarried with Cora M., a daughter of said deceased, took possession of the entire estate of said Lewis Tumlin, and on the 11th day of June, 1875, procured temporary letters of administration on said estate to be issued to him and said N. B. Tumlin, and on that day they gave bond as such in the sum of two hundred thousand dollars, with Abda Johnson, William T. Wofford, John W. Gray, James M. Veach, and Edwin M. Price, all of said county, as sureties. A certified copy of said bond is hereto attached, marked "Exhibit A," to which, as well as all the other exhibits to this bill hereinafter named, your oratrix prays the usual leave of reference.

That said temporary administration continued until the 2d day of August, 1875, during which time said Frank P. Gray, as such temporary administrator, had the actual control, possession, and management of said estate, the connection of said N. B. Tumlin therewith being, as your oratrix is informed and believes, merely nominal.

[That on the 2d day of August, 1875, said Frank P. Gray and one John A. Erwin, then of said county, took out permanent letters of administration on said estate, and on that day gave bond in the sum of six hundred thousand dollars as such administrators, with the

said Abda Johnson, William T. Wofford, John W. Gray, James M. Veach, and Edwin M. Price, all of said county as aforesaid, and also Noah King, A. C. Trimble, Joel H. Dyer, W. W. Rich, James C. Wofford, Nelson Gilreath, John J. Howard, Thomas Stokely, R. L. Rogers, W. I. Benham, John S. Leake, and Thomas Tumlin, all of said county; A. W. Mitchell, of the county of Fulton, and L. R. Ramsaur, J. G. B. Erwin, and Henry C. Erwin, all of the county of Gordon, as sureties, a certified copy of which bond is hereto attached, marked "Exhibit B."

That the joint administration of said Frank P. Gray and John A. Erwin continued from said 2d day of August, 1875, until the 2d day of May, 1876, when the said John A. Erwin resigned, 1139½ giving in his application for leave to resign as his reason therefor his ill health; but your oratrix is informed and believes that the real reason for his resignation was because he was an excellent business man, of upright character, and desired to avoid the ruin with which he was threatened by the fraud, waste, and misconduct of his co-administrator, the said Frank P. Gray, as hereinafter set forth, and who, as your oratrix is informed and believes, during all of said co-administration usurped the entire control and management of said estate, and only permitted said John A. Erwin to act nominally.]

That upon the resignation of the said John A. Erwin the said Frank P. Gray gave bond as sole administrator on said estate, dated on the 2d day of May, 1876, in the sum of one hundred and forty thousand dollars, with the said Abda Johnson, William T. Wofford, E. M. Price, Noah King, W. W. Rich, John W. Gray, John S. Leake, Nelson Gilreath, J. C. Wofford, and one T. W. Leake, of said county, as his sureties, a copy of which bond is hereto annexed, marked "Exhibit C."

That prior to the 18th day of October, 1877, said William T. Wofford, J. C. Wofford, and W. W. Rich, applied to be relieved from their suretyship on the bond last above described, and were on that day relieved, and said Frank P. Gray gave a new bond as administrator on said estate, with the said Nelson Gilreath, Thos. Tumlin, Abda Johnson, Noah King, Jno. S. Leake, T. W. Leake, John W. Gray, and one A. P. Wofford and one F. M. Ford, both of said county, as sureties; said bond being also in the sum of one hundred and forty thousand dollars, a certified copy whereof is hereto attached, marked "Exhibit D."

That prior to the 6th day of May, 1878, said Noah King applied to be relieved from his suretyship on said bond of October 13, 1877, and was, on said 6th day of May, 1878, relieved, and on that day said Frank P. Gray gave a new bond as such administrator, with the said A. P. Wofford, John S. Leake, Thomas W. Leake, F. M. Ford, John W. Gray, Nelson Gilreath, and Abda Johnson as sureties; said bond being also in the sum of one hundred and forty thousand dollars, a copy whereof is hereto attached, marked "Exhibit E."

That the last-described bond is the one under which the said Frank P. Gray is now acting as administrator, and that he is still in possession of the assets of said estate not heretofore disposed of.

That previous to the death of said Lewis Tumlin he had made advancements to some of his children and heirs, amounting in the aggregate to about thirty-seven thousand dollars, and that on the 2d day of October, 1875, an account was taken by commissioners appointed for that purpose of these advancements, and a distribution of property in kind was made by them, by which the heirs received each twenty-four thousand dollars from said estate; those who had received no advancements being, by this distribution, brought up with those who had, and all the heirs gave refunding bonds.

That besides this distribution your oratrix has received nothing from said estate except the sum of less than one thousand dollars.

Your oratrix further shows that at the time of the death of said Lewis Tumlin his estate was abundantly solvent, and that his liabilities did not exceed the sum of — dollars, all of which ought to have long since been fully paid off and settled and said estate fully wound up, and the balance remaining upon account of said administration should have been distributed and paid over to the heirs of said Lewis Tumlin, deceased, as the said Frank P. Gray undertook and promised to do, by his said several bonds aforesaid, and as he was bound by law to do, but which your oratrix avers he has utterly failed and refused to do or in any way to account with your
1139c oratrix aforesaid concerning her distributive share in said estate or, as your oratrix is informed and believes, with any of the other heirs of said estate.

Your oratrix further shows, avers, and charges that said Frank P. Gray, immediately after he took charge of said estate, entered upon a general course of illegal conduct in connection therewith, consisting of mismanagement, negligence, waste, and fraud; that he failed to make out a true and perfect inventory of said estate in the beginning, and has annually since that time made false, fraudulent, and incomplete returns to the ordinary of the affairs of said estate, by which he has attempted to defraud your oratrix and the other heirs thereof out of large sums of money.

As instances of this negligence, waste, and fraud your oratrix is informed, believes, and charges that, besides many other acts of like character too numerous to be stated in this bill, he has committed the following negligent, illegal, and fraudulent acts, to wit:

That he neglected to include in the inventory of said estate the wild lands thereof, amounting to about two thousand acres, or have the same appraised or to include therein the farm in the county of ——, which your oratrix charges, on information and belief, to be of the aggregate value of — dollars.

That he included in said inventory only 75 shares of stock in the Planters' and Miners' Bank of Cartersville, which was appraised at five thousand six hundred and twenty-five dollars, when in fact said Lewis Tumlin, at the time of his death, owned and held about twice that number of shares, which were worth about eleven thousand five hundred dollars, and he has only heretofore accounted in his returns for the income and dividends on the amount included in the inventory, to the injury of said estate several thousand dollars.

That the evidences of debt described in said inventory in many instances contained valid contracts for the payment of rates of interest ranging from ten to twenty per cent. per annum, by reason whereof large sums of interest had accumulated and has since accumulated thereon, while in and by said inventory all are described simply by date of execution or maturity, so that in and by said inventory, unless your oratrix and the other heirs can discover the facts from other sources, they will be unable to ascertain what interest has accrued or been collected thereon.

That at the time of the death of said Lewis Tumlin he had cash on hand the sum of twelve thousand and twenty-nine and $\frac{97}{100}$ dollars, while said Gray in his returns only accounts for the sum of eleven thousand two hundred and fifty-five and $\frac{58}{100}$ dollars, and your oratrix avers that the difference between these sums went into his hands.

That on the 7th day of June, 1875, while the papers of said estate were in the hands of said F. P. Gray, one Randolph Borders paid him one thousand dollars upon a note due said estate, which he credited on said note and which sum he had in his hands when he qualified as temporary administrator and has never accounted for.

That on his first annual return he credits himself with $2\frac{1}{2}$ per cent. on the sum of thirty-four thousand six hundred and seventy-eight dollars, cash received, including in said amount the cash on hand at the death of said Lewis Tumlin, upon which your oratrix is advised and believes he was entitled to no commissions.

That in all of his returns he has credited himself with ten per cent. commissions on interest collected, including in the amounts upon which he charges these commissions the interest which accrued in the lifetime of the said Lewis Tumlin, upon which your oratrix is advised and believes he was only entitled to commissions at the rate of two and one-half per cent.

That in his first return he credits himself with three hun-
1139*d* dred and eighteen dollars, commissions at ten per cent. on growing crops, which your oratrix is advised and believes is illegal.

That in said first return he credits himself with the sum of three thousand four hundred and thirty-three and fifty-eight one hundred dollars for commissions at 3 per cent. on the property distributed in kind among the heirs, while in fact the property so distributed consisted only of real estate, and surveyors and commissions were paid from the estate, and the work was done in a few days and with little or no trouble to the administrator, and your oratrix is advised and believes that such charge is illegal, excessive, and unjust.

That at the time he took charge of the estate he received two notes on A. R. Hudgins—one for one thousand dollars, bearing interest at 12 per cent. per annum, and one for a balance of five hundred dollars, bearing interest at 18 per cent. per annum; that he has collected the principal and interest on these notes, amounting to over three thousand dollars, and though said collections were made prior to his last annual return he has only accounted for about two hundred dollars of the same.

That in July, 1875, he collected of R. Borders two hundred and thirty-three dollars, for which he has never accounted.

That some time during the year 1879 he collected on a debt due from one E. N. Gower seven or eight hundred dollars, for which he has never accounted.

That at the time of the death of the said Lewis Tumlin he owned one-third interest in a newspaper office in the city of Cartersville, and that said Frank P. Gray afterwards, in the year 1878, procured it to be sold at sheriff's sale, and bid it off himself for about fourteen hundred dollars, and has never accounted for the same.

That among the assets of said estate going into his hands were the notes of one J. W. Clayton, an insolvent person, for about fifteen hundred dollars, for the purchase-money of a tract of land, which was amply worth that amount; that said Gray sued said claim to judgment, and had said land brought to sale for said purchase-money, and instead — bidding in said land for the estate or otherwise trying to make said lands bring their value he procured it to be bid off for his wife, said Cora M. Gray, for five hundred and fifteen dollars, by reason whereof said estate was defrauded out of over one thousand dollars.

That for five years he has received the rents of a farm in the State of Alabama belonging to said estate, during which time he has accounted in his returns for one year only, to wit, for the year 1878, at the sum of two hundred and seventy-five dollars, and your oratrix avers and charges that for the other four years he has received over one thousand dollars on this account, of which returns have not been made.

That he has received the rents of a farm in the county of Floyd of the value of from one hundred and fifty to two hundred dollars per annum for six years and has accounted for only four years' rent.

That he has received all the rents and profits of the farm in —— county, Ga., for five or six years, of the value of — dollars per annum, and has never accounted for any part of the same.

That he has paid from the funds of said estate to one John W. Wofford for services as attorney-at-law five hundred dollars, when at the same time said Wofford was indebted to said estate several thousand dollars by note, and was hopelessly insolvent and had removed from said State to the State of Missouri.

That, in addition to the above, he has paid out from the funds of said estate for his pretended personal expenses and for agents to perform his duties as administrator and for counsel fees about six thousand dollars, most of which was uselessly, recklessly, and illegally paid out.

1139e That there came into his hands, besides many smaller notes, too numerous to mention, the following notes and other evidences of debt against persons who were abundantly solvent, and most of them secured by mortgages, liens, and otherwise, and although he has had control of said estate for more than five years he has either in whole or in part failed and neglected to collect them, or if he has collected them has failed to account for them, to wit:

Notes of James Dunn and William Davidson, $125.00; Frank Hill, note, $250.00; G. W. and C. W. Harris, notes, $6,000.00; Peter Hall, note, $225.00; Heathe, Tate & Allen, note, $150.00; G. W. Lawrence, note, $400.00; J. S. Leake, note, $1,000.00; T. C. Moore, note, $800.00; J. A. Pulliam, note, $1,250.00; W. M. Tumlin, various notes, amounting to from $5,000.00 to $6,000.00; N. J. Tumlin, note, $250.00; Hardie Strickland, note, $1,612.00; R. M. Young, judgment, about $5,000.00; Isham Alley, notes, $4,500.00; T. H. Baker, note, $150.00; T. F. Bridgers, note, $250.00; upon which notes, or some of them, your oratrix is informed and believes he has collected large sums, amounting in the aggregate to over five thousand dollars, of which he has made no returns.

That upon the return made by him and said Erwin in the year 1876 he has taken credit for the sum of five thousand four hundred and sixty-eight and $\frac{29}{100}$ dollars for the illegal commissions and extra compensation hereinbefore described and for other commissions, and that he has again, on his annual return, made in the year 1877, taken credit for the same sum and the same commissions, thereby attempting to defraud said estate out of that amount.

That on his annual return, made in the year 1879, he charges himself with two thousand one hundred and sixty-eight and $\frac{29}{100}$ dollars as amount collected by Julius L. Brown for said estate from the Virginia Home Insurance Company, and takes credit for the sum of one thousand and eighty-four and $\frac{14}{100}$ dollars for fees paid said Brown for collecting said debt, when in fact the sum collected by said Brown was three thousand two hundred and fifty-two and $\frac{43}{100}$ dollars, and the said sum of two thousand one hundred and sixty-eight and $\frac{29}{100}$ dollars was the net amount paid over to him by said Brown after deducting his fees of one thousand and eighty-four and $\frac{14}{100}$ dollars.

That, as your oratrix is informed and believes, there existed on the 21st day of June, 1879, a judgment in the superior court of said county in favor of N. L. Angier, trustee, etc., against said Gray, as administrator of said Tumlin, for fifteen thousand six hundred and seven and $\frac{91}{100}$ dollars upon a debt made by said Tumlin in his lifetime, upon which execution had been issued and levied upon the lands of said estate; that on said 21st day of June, 1879, said Frank P. Gray paid to T. Warren Akin, plaintiff's attorney, the principal, interest, and cost due thereon, and procured said Akin to sign a receipt on a separate piece of paper, which he returned as a voucher for the year 1879, and upon which he took credit on his returns for that sum, but your oratrix is informed and believes that instead of having said *fi. fa.* entered satisfied and returned, as was his duty to do, he carried the same to Atlanta and transferred it to one John Neal, who now holds it as an open *fi. fa.* and outstanding judgment against said estate. Your oratrix is not at present advised as to whether said estate can be protected against loss on account of this transaction. She states it as an instance showing the manner in which he has dealt with the affairs of said estate.

That at the time of the death of said Lewis Tumlin he held the notes of Cook & Cheek for the sum of fifteen thousand dollars, which

was past due and when the same came into the hands of said Frank P. Gray, he, without authority of law, took new notes and extended the time of payment and neglected to sue them, when
1139*f* he well knew that it was his duty to do so, and, by his negligence in this matter, lost to said estate over ten thousand dollars.

That at the time of the death of the said Lewis Tumlin he was one of the partners of the firm of B. G. Poole & Co., the other two partners being D. W. K. Peacock and B. G. Poole; that said Peacock and Poole were both largely indebted to said firm of B. G. Poole & Co., and by reason of such indebtedness and the state of the partnership accounts, as oratrix is informed and believes, said Lewis Tumlin was entitled to all the assets of said firm. Oratrix further shows that soon after said Gray became such administrator he possessed himself of all the effects of said partnership of the value of several thousand dollars and has disposed of all of them, and has converted the proceeds to his own use, and has not accounted for the same or made any returns thereof.

Your oratrix believes, avers, and charges that by reason of the negligence, mismanagement, and frauds aforesaid, and by reason of numerous other acts of like character, he has wasted of the assets of said estate sixty or seventy thousand dollars, for which he is liable to account to the heirs.

Your oratrix further shows that at the time of the death of said Lewis Tumlin said Frank P. Gray had no property of his own whatever, and that his father, the said John W. Gray, one of his sureties, was worth but little, and that the said Cora M. Gray, wife of said Frank P. Gray, had nothing except her interest in the estate of said Lewis Tumlin; that soon after said Frank P. Gray was appointed administrator of said estate he entered into partnership with his father, said John W. Gray, and began the erection of the cotton mill in said county known as the Oothcaloga Cotton Mills, at Adairsville, and your oratrix avers, believes, and charges that most of the ready money used in its erection, amounting to thirty or forty thousand dollars, was derived from the estate of said Lewis Tumlin, and was furnished by said F. P. Gray to said firm of J. W. & F. P. Gray; and as your oratrix believes and charges, for the purpose of trying to prevent said funds from being traced and the said cotton factory from being subjected to the just claim of the heirs of said estate, he confederated with his said wife, Cora M., in the month of April, 1876, executed a mortgage to her on one-half interest in said cotton mill for the sum of thirteen thousand five hundred dollars, and again in the year 1879 further confederating with his said wife, Cora M., and his father, John W. Gray, he and the said John W. Gray executed another mortgage to the said Cora M. Gray on said entire cotton mill property for the sum of over twenty-one thousand dollars, both of which mortgages your oratrix is informed and believes the said Cora M. Gray now holds; and your oratrix is informed, believes, and charges that, further confederating with his said wife, he has with the funds of said estate bought a large plantation in the State of Mississippi, known as the French place, on Deer creek, in the county

of Washington, in the said State, for the sum of twenty-three thousand dollars, and taken titles to the same in the name of the said Cora M. Gray, while the said Cora M. still holds about four thousand dollars' worth of the property distributed to her in kind out of the twenty-four thousand dollars first set apart to each of the heirs, so that, as your oratrix believes and charges, said Frank P. Gray has invested in said cotton mill or mortgages and said Mississippi plantation in the name of said Cora M. more than thirty-seven thousand dollars of the funds of said estate, besides the distributive share of his said wife.

Your oratrix further shows that, while she is unable specifically to state when said acts of waste and fraud were committed, she is informed and believes that most of them were committed after the resignation of the said John A. Erwin as a co-administrator, and she is informed and believes that the bonds given by said Gray and Tumlin as temporary administrators, and said Gray and Erwin as co-administrators, are sufficient to protect the heirs of said estate against loss on account of waste committed up to the time said Erwin resigned; but your oratrix avers and charges that the present bond of said Frank P. Gray is wholly insufficient to protect your oratrix and the other heirs on account of the waste already committed, for your oratrix avers, on information and belief, that three of the securities on said bond are insolvent, and that the other four are not worth, over and beyond their liabilities, more than forty thousand dollars.

1139*g*

Your oratrix further shows that besides the notes and accounts and other rights and credits hereinbefore described, and many other uncollected demands in the hands of said F. P. Gray, administrator, there remains real estate of the appraised value of about twenty thousand dollars which has never been sold or distributed, besides the wild lands aforesaid, amounting to some two thousand acres, all of which said Frank P. Gray, administrator is now trying to obtain leave to sell from the ordinary of said county, and which your oratrix fears, if he is permitted to do, he will convert into money, and said lands be lost to the heirs of said estate.

Your oratrix further shows that since the resignation of said John A. Erwin he has sold out all his property in said State and removed beyond the jurisdiction of the court; that Thomas Stokely, one of the sureties on the bond of the said Gray and Erwin, has died, and his estate is unrepresented; that L. R. Ramsaur, of the county of Gordon, another of said sureties, has also died, and one Henry C. Ramsaur is his administrator.

That your oratrix has reason to fear and does fear that the balance of said estate, real and personal, of said Lewis Tumlin, deceased, will be wasted and lost unless she can obtain the aid of a court of equity for its protection, as the said Frank P. Gray is not only largely in debt but insolvent, outside of his liability to said estate.

Your oratrix, therefore, in consideration of the premises, waiving discovery from all and each of the several defendants hereinafter named, prays that the State's writ of subpœna may issue directed to the said Frank P. Gray, Cora M. Gray, John W. Gray, N. B. Tumlin,

was past due and when the same came into the hands of said Frank P. Gray, he, without authority of law, took new notes and extended the time of payment and neglected to sue them, when
1139*f* he well knew that it was his duty to do so, and, by his negligence in this matter, lost to said estate over ten thousand dollars.

That at the time of the death of the said Lewis Tumlin he was one of the partners of the firm of B. G. Poole & Co., the other two partners being D. W. K. Peacock and B. G. Poole; that said Peacock and Poole were both largely indebted to said firm of B. G. Poole & Co., and by reason of such indebtedness and the state of the partnership accounts, as oratrix is informed and believes, said Lewis Tumlin was entitled to all the assets of said firm. Oratrix further shows that soon after said Gray became such administrator he possessed himself of all the effects of said partnership of the value of several thousand dollars and has disposed of all of them, and has converted the proceeds to his own use, and has not accounted for the same or made any returns thereof.

Your oratrix believes, avers, and charges that by reason of the negligence, mismanagement, and frauds aforesaid, and by reason of numerous other acts of like character, he has wasted of the assets of said estate sixty or seventy thousand dollars, for which he is liable to account to the heirs.

Your oratrix further shows that at the time of the death of said Lewis Tumlin said Frank P. Gray had no property of his own whatever, and that his father, the said John W. Gray, one of his sureties, was worth but little, and that the said Cora M. Gray, wife of said Frank P. Gray, had nothing except her interest in the estate of said Lewis Tumlin; that soon after said Frank P. Gray was appointed administrator of said estate he entered into partnership with his father, said John W. Gray, and began the erection of the cotton mill in said county known as the Oothcaloga Cotton Mills, at Adairsville, and your oratrix avers, believes, and charges that most of the ready money used in its erection, amounting to thirty or forty thousand dollars, was derived from the estate of said Lewis Tumlin, and was furnished by said F. P. Gray to said firm of J. W. & F. P. Gray; and as your oratrix believes and charges, for the purpose of trying to prevent said funds from being traced and the said cotton factory from being subjected to the just claim of the heirs of said estate, he confederated with his said wife, Cora M., in the month of April, 1876, executed a mortgage to her on one-half interest in said cotton mill for the sum of thirteen thousand five hundred dollars, and again in the year 1879 further confederating with his said wife, Cora M., and his father, John W. Gray, he and the said John W. Gray executed another mortgage to the said Cora M. Gray on said entire cotton mill property for the sum of over twenty-one thousand dollars, both of which mortgages your oratrix is informed and believes the said Cora M. Gray now holds; and your oratrix is informed, believes, and charges that, further confederating with his said wife, he has with the funds of said estate bought a large plantation in the State of Mississippi, known as the French place, on Deer creek, in the county

of Washington, in the said State, for the sum of twenty-three thousand dollars, and taken titles to the same in the name of the said Cora M. Gray, while the said Cora M. still holds about four thousand dollars' worth of the property distributed to her in kind out of the twenty-four thousand dollars first set apart to each of the heirs, so that, as your oratrix believes and charges, said Frank P. Gray has invested in said cotton mill or mortgages and said Mississippi plantation in the name of said Cora M. more than thirty-seven thousand dollars of the funds of said estate, besides the distributive share of his said wife.

Your oratrix further shows that, while she is unable specifically to state when said acts of waste and fraud were committed, she is informed and believes that most of them were committed after the resignation of the said John A. Erwin as a co-administrator, and she is informed and believes that the bonds given by said Gray
1139*g* and Tumlin as temporary administrators, and said Gray and Erwin as co-administrators, are sufficient to protect the heirs of said estate against loss on account of waste committed up to the time said Erwin resigned; but your oratrix avers and charges that the present bond of said Frank P. Gray is wholly insufficient to protect your oratrix and the other heirs on account of the waste already committed, for your oratrix avers, on information and belief, that three of the securities on said bond are insolvent, and that the other four are not worth, over and beyond their liabilities, more than forty thousand dollars.

Your oratrix further shows that besides the notes and accounts and other rights and credits hereinbefore described, and many other uncollected demands in the hands of said F. P. Gray, administrator, there remains real estate of the appraised value of about twenty thousand dollars which has never been sold or distributed, besides the wild lands aforesaid, amounting to some two thousand acres, all of which said Frank P. Gray, administrator is now trying to obtain leave to sell from the ordinary of said county, and which your oratrix fears, if he is permitted to do, he will convert into money, and said lands be lost to the heirs of said estate.

Your oratrix further shows that since the resignation of said John A. Erwin he has sold out all his property in said State and removed beyond the jurisdiction of the court; that Thomas Stokely, one of the sureties on the bond of the said Gray and Erwin, has died, and his estate is unrepresented; that L. R. Ramsaur, of the county of Gordon, another of said sureties, has also died, and one Henry C. Ramsaur is his administrator.

That your oratrix has reason to fear and does fear that the balance of said estate, real and personal, of said Lewis Tumlin, deceased, will be wasted and lost unless she can obtain the aid of a court of equity for its protection, as the said Frank P. Gray is not only largely in debt but insolvent, outside of his liability to said estate.

Your oratrix, therefore, in consideration of the premises, waiving discovery from all and each of the several defendants hereinafter named, prays that the State's writ of subpœna may issue directed to the said Frank P. Gray, Cora M. Gray, John W. Gray, N. B. Tumlin,

Abda Johnson, William T. Wofford, J. C. Wofford, A. P. Wofford, James M. Veach, Edwin M. Price, Noah King, John S. Leake, Thomas W. Leake, Thomas Tumlin, A. C. Trimble, Joel H. Dyer, W. W. Rich, Nelson Gilreath, John J. Howard, R. L. Rogers, W. I. Benham, F. M. Ford, all of said county; A. W. Mitchell, of the county of Fulton, and Henry C. Ramsaur, administrator on the estate of L. R. Ramsaur; J. G. B. Erwin, and Henry C. Erwin, all of the county of Gordon, in said State.

Your oratrix further prays that the State's writ of injunction may issue directed to the said Frank P. Gray, enjoining and restraining him from collecting or receiving any of the assets of said estate, or in any manner selling or disposing of the same, or prosecuting said application for leave to sell said lands, or advertising the same for sale, or selling or attempting to sell the same, or otherwise intermeddling with the affairs and business of said estate; and that the State's writ of injunction may also issue directed to the said Frank P. Gray and John W. Gray, enjoining them from selling or otherwise encumbering said cotton mill at Adairsville, Georgia; and that the State's writ of injunction may issue to the said Cora M. Gray, enjoining and restraining her from selling or encumbering said farm in the State of Mississippi, or from collecting or transferring said two mortgages upon said cotton factory in this bill described.

And your oratrix further prays that, pending the foregoing application for injunction and until your oratrix's prayers ever be heard according to law, her rights and interests and the rights and
1139*h* interests of said estate may be protected by a suitable restraining order.

Your oratrix further prays that a receiver may be appointed to take charge of the property and assets of said estate, with authority to collect them and distribute them under the direction of the court.

Your oratrix further prays that, pending this bill, an auditor may be appointed to take and state an account of the assets of said estate going into the hands of said Frank P. Gray, and of his disbursements and expenses, and to take an account of the waste aforesaid and when it was committed, and also to state an account between your oratrix and said Gray as administrators of said estate.

Your oratrix further prays that upon the final trial of said case she may have a decree for such sum as may be found due her from said Frank P. Gray, and, if necessary for the satisfaction of such decree, that said Cora M. Gray may be declared to hold said mortgage on said cotton mills and said J. W. and F. P. Gray the equity of redemption thereto as trustees for the satisfaction of your oratrix's claim, and that the respective liabilities of the sureties on said several bonds may be fixed by decree of the court.

Your oratrix further prays that she may have such other and further relief as her case may require and is equitable and usual in such cases; and your oratrix will ever pray, etc.

JAMES B. CONYERS,
GRAHAM & FOUTE,
Complainant's Solicitors.

EXHIBIT "A."

GEORGIA, *Bartow County:*

Know all men by these presents that we, Frank P. Gray and N. B. Tumlin, principals; A. Johnson, W. T. Wofford, John W. Gray, James M. Veach, and E. M. Price, securities, are held and firmly bound unto the ordinary of said county and his successors in office in the sum of two hundred thousand dollars; to the payment of which, well and truly to be made, we bind ourselves and heirs, executors and administrators, firmly by these presents.

Subscribed with our hands and sealed with our seals this 11th day of June, 1875.

The condition of the above obligation is such that whereas the above-bound Frank P. Gray and N. B. Tumlin have this day applied to J. A. Howard, ordinary of said county, for and have obtained temporary letters of administration of the goods and chattels, rights and credits of Lewis Tumlin, deceased: Now, if the above-bound Frank P. Gray and N. B. Tumlin shall carefully collect and preserve from waste or loss all the goods, chattels, and effects of the said Lewis Tumlin, deceased, and shall make or cause to be made a true and perfect inventory of all such estate, and, the same being so preserved, do surrender up such estate and effects, with the inventory aforesaid, unto the legal and proper administrators on or before the first Monday in August next, or so soon thereafter as the ordinary shall direct, with all his other actings and doings therein, and faithfully perform the trust reposed in him, then this obligation to be void; otherwise to remain in full force in law.

FRANK P. GRAY. [L. S.]
N. TUMLIN. [L. S.]
A. JOHNSON. [L. S.]
WM. T. WOFFORD. [L. S.]
JOHN W. GRAY. [L. S.]
JAS. M. VEACH. [L. S.]
EDWIN M. PRICE, [L. S.]
By WM. T. WOFFORD, [L. S.]
Attorney-in-Fact.

Tested and approved by—
J. A. HOWARD, *Ordinary.*

GEORGIA, *Bartow County:*

I, J. A. Howard, ordinary in and for said county, hereby certify that the within is a full, true, and complete copy of the temporary administrators' bond of F. P. Gray and N. B. Tumlin, temporary administrators of Lewis Tumlin, deceased, as of file in the ordinary's office of said county.

Witness my hand and seal this December 3, 1880.

J. A. HOWARD, *Ordinary.*

1139*i* EXHIBIT "B."

STATE OF GEORGIA, *Bartow County:*

Know all men by these presents that we, Frank P. Gray and John A. Erwin, as principals, and William T. Wofford, Abda Johnson, John W. Gray, James M. Veach, Noah King, Edwin M. Price, A. C. Trimble, Joel H. Dyer, W. W. Rich, James C. Wofford, Nelson Gilreath, John J. Howard, A. W. Mitchell, Thomas Stokely, R. L. Rogers, L. R. Ramsaur, J. G. B. Erwin, Henry C. Erwin, W. I. Benham, John S. Leake, and Thomas Tumlin, as securities, are held and firmly bound and obligated unto the honorable the ordinary of said county for the time being, and his successors in office, in the sum of six hundred thousand dollars, to be paid to the said ordinary, his successors in office or assigns; for which payment, well and truly to be made and done, we bind ourselves, jointly and severally, and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated at Cartersville this 2d day of August, A. D. 1875.

The conditions of the above obligation are such that if the above-bound Frank P. Gray and John A. Erwin, administrators of the goods, chattels, and credits of Lewis Tumlin, deceased, do make a true and perfect inventory of all and singular the goods, chattels, and credits of the said deceased which have or shall *have* come to the hands, possession, or knowledge of the said Frank P. Gray and John A. Erwin, or in the hands or possession of any other person or persons for them, and the same so made do exhibit in the court of ordinary of said county when they shall be thereunto required, and such goods, chattels, and credits do well and truly administer according to law, and make a just and true account of their actions and doings therein when required by the superior court or the ordinary for the said county; and all the rest of the goods, chattels, and credits which shall be found remaining upon the account of the said administration, the same being first allowed by the said court, shall deliver and pay to such persons, respectively, as are entitled to the same by law. And if it shall hereafter appear that any last will and testament was made by the said deceased, and the same be proved before the court, and the executors obtain a certificate of the probate thereof, and the said Frank P. Gray and John A. Erwin, as in such case if required, render and deliver up the said letters of administration, then this obligation to be void; else to remain in full force.

F. P. GRAY. [L. S.]
JOHN. A. ERWIN. [L. S.]
WM. T. WOFFORD. [L. S.]
ABDA JOHNSON. [L. S.]
W. W. RICH. [L. S.]

And the following persons, to wit:

JOHN W. GRAY, [L. S.]
JAMES M. VEACH, [L. S.]
NOAH KING, [L. S.]
A. C. TRIMBLE, [L. S.]
EDWIN M. PRICE, [L. S.]
JOEL H. DYER, [L. S.]
By their attorney-in-fact, WM. T. WOFFORD. [L. S.]
JOHN S. LEAK, [L. S.]
NELSON GILREATH, [L. S.]
J. C. WOFFORD, [L. S.]
J. J. HOWARD, [L. S.]
A. W. MITCHELL, [L. S.]
By J. J. HOWARD,
Attorney-in-Fact.
THOMAS STOKELY, [L. S.]
ROBERT L. ROGERS, [L. S.]
By J. J. HOWARD,
Attorney-in-Fact.
L. R. RAMSAUR, [L. S.]
J. G. B. ERWIN, [L. S.]
H. C. ERWIN, [L. S.]
By their attorney-in-fact, H. C. RAMSAUR. [L. S.]
W. I. BENHAM. [L. S.]
THOMAS TUMLIN. [L. S.]

Signed, sealed, and delivered in presence of—
J. A. HOWARD, *Ordinary.*

STATE OF GEORGIA, *Bartow County:*

I, J. A. Howard, ordinary in and for said county, do hereby certify that the within is a full, true, and complete copy of the administrators' bond of Frank P. Gray and John A. Erwin, administrators of Lewis Tumlin, deceased, dated 2d day of August, 1875, as appears of file and record in the ordinary's office of said county.

Witness my hand and seal of office this 14th day of October, 1880.

J. A. HOWARD, *Ordinary.*

EXHIBIT C.

GEORGIA, *Bartow County:*

Know all men by these presents that we, Frank P. Gray, principal, and Abda Johnson, Wm. T. Wofford, E. M. Price, Noah King, W. W. Rich, John W. Gray, John S. Leake, Nelson Gilreath,
1139*j* J. C. Wofford, T. W. Leake, sureties, are held and firmly bound unto J. A. Howard, ordinary for said county, and his successors in office, in the just and full sum of one hundred and forty thousand dollars; for the payment of which sum to the said ordinary and his successors in office we bind ourselves and heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this second day of May, in the year eighteen hundred and seventy-six.

The condition of the above bond is such that whereas Frank P. Gray and John A. Erwin were heretofore, to wit, on the second day of August, A. D. eighteen hundred and seventy-five, appointed administrators of the estate of Lewis Tumlin, late of said county, deceased, and gave bond and security in terms of the law; and

Whereas on the twelfth day of April, A. D. 1876, said John A. Erwin filed an application before the ordinary of said county to be permitted to resign his office of administrator on acconnt of his bad health and physical infirmity, and said application having been heard and his resignation allowed, an order having been passed by said court requiring said Frank P. Gray to give a new bond and security in the sum of one hundred and forty thousand dollars:

Now, if the above bound Frank P. Gray shall well and truly administer the goods and chattels, rights and credits, lands and tenements, of the said Lewis Tumlin, deceased, which remains to be administered, and which have come to the hands, possession, or knowledge of the said Frank P. Gray, or in the hands or possession of any other person or persons for him, and the same do exhibit in the said court of ordinary, when he shall be thereunto required, and such goods, chattels, and credits do well and truly administer according to law, and do make a just and true account of his actings and doings therein when he shall be thereunto required by the court of ordinary of said county, and all the rest of the goods and chattels and credits which shall be found running upon the account of said administration, the same being first allowed by the court, shall deliver and pay to such person or persons, respectively, as are entitled to the same by law; and if it shall hereafter appear that any last will and testament was made by said deceased and the same be proved before the court and the executor obtain a certificate of probate thereof and the said Frank P. Gray do in such case, if required, render and deliver up the said letters of administration, then this obligation to be void; else to remain in full force.

FRANK P. GRAY. [L. S.]
ABDA JOHNSON. [L. S.]
WM. T. WOFFORD. [L. S.]
EDWIN M. PRICE, [L. S.]
NOAH KING, [L. S.]
W. W. RICH, [L. S.]
J. W. GRAY, [L. S.]
By W. T. WOFFORD,
Attorney-in-Fact.
J. C. WOFFORD. [L. S.]
JOHN S. LEAKE, [L. S.]
By JOHN W. WOFFORD,
Attorney-in-Fact.
THOMAS W. LEAKE, [L. S.]
By JOHN W. WOFFORD,
Attorney-in-Fact.
NELSON GILREATH. [L. S.]

Attested and approved by—
J. A. HOWARD, *Ordinary.*

STATE OF GEORGIA, *Bartow County:*

I, J. A. Howard, ordinary in and for Bartow county, do hereby certify that the within is a full, true, and complete copy of the administrator's bond of Frank P. Gray, administrator of Lewis Tumlin, deceased, dated 2d day of May, 1876, as appears of file and record in the ordinary's office of said county.

Witness my hand and seal of office this 14th day of October, 1880.
J. A. HOWARD, *Ordinary.*

"EXHIBIT D."

GEORGIA, *Bartow County:*

Know all men by these presents that we, Frank P. Gray, principal, and Nelson Gilreath, A. P. Wofford, Thomas Tumlin, Abda Johnson, Noah King, F. M. Ford, John S. Leake, Thomas W. Leake, and John W. Gray, securities, are held and firmly bound unto J. A. Howard, ordinary of said county, and his successors in office, in the just and full sum of one hundred and forty thousand dollars; for the payment of which sum to the said ordinary and his
1139*k* successors in office we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 13th day of October, A. D. 1877.

The conditions of the above bond are such that whereas Frank P. Gray gave bond and security as the sole administrator of Lewis Tumlin, deceased, for the sum of one hundred and forty thousand dollars, said bond dated the 2d day of May, A. D. 1876, his co-administrator, John A. Erwin, having resigned his trust, which resignation was allowed by order of the court of ordinary of said county; and whereas Wm. T. Wofford, James C. Wofford, and William W. Rich, three of the securities for the said Frank P. Gray, as administrator aforesaid, on said administrator's bond, dated 2d day of May, 1876, filed an application for relief from all future liability on said administrator's bond in the court of ordinary of said county on the 23d of March, 1877, making charges of mismanagement, etc.; and whereas at the October term, 1877, of said court said William T. Wofford, James C. Wofford, and William W. Rich withdrew their charges of mismanagement, and claimed their release from liability on said bond as matter of right, and the said court of ordinary at said term having passed an order relieving said securities from all further liability on said bond, and requiring said Frank P. Gray to give new bond and security in the sum of one hundred and forty thousand dollars:

Now, if the above-bound Frank P. Gray shall well and truly administer all the goods and chattels, rights and credits, lands and tenements, of the said Lewis Tumlin, deceased, which remain to be administered, which have or shall come to the hands, possession, or knowledge of the said Frank P. Gray, or in the hands or possession

of any other person or persons for him, and the same do exhibit in the said court of ordinary when he shall be thereunto required, and such goods, chattels, and credits do well and truly administer according to law, and do make a just and true account of his actings and doings therein when he shall be thereunto required by the court of ordinary of said county, and all the rest of the goods, chattels, and credits which shall be found remaining upon the account of said administration, the same being first allowed by the court, shall deliver and pay to such person or persons, respectively, as are entitled to the same by law, and if it shall hereafter appear that any last will and testament was made by said deceased, and the same be proven before the court, and the executor obtain a certificate of probate thereof, and the said Frank P. Gray do in such case, if required, render and deliver up said letters of administration, then this bond to be void; else to remain in full force.

FRANK P. GRAY. [L. S.]
N. GILREATH. [L. S.]
A. P. WOFFORD. [L. S.]
THOMAS TUMLIN, [L. S.]
By his attorney-in-fact, A. P. WOFFORD.
A. JOHNSON. [L. S.]
NOAH KING, [L. S.]
By his attorney-in-fact, ABDA JOHNSON.
F. M. FORD. [L. S.]
JOHN S. LEAKE. [L. S.]
THOMAS W. LEAKE. [L. S.]
JOHN W. GRAY, [L. S.]
By his attorney-in-fact, A. P. WOFFORD.

Attested and approved by—
J. A. HOWARD, *Ordinary.*

STATE OF GEORGIA, *Bartow County:*

I, J. A. Howard, ordinary in and for said county, do hereby certify that the within is a full, true, and complete copy of the administrator's bond of Frank P. Gray, administrator of Lewis Tumlin, deceased, dated 13th day of October, A. D. 1877, as appears of file in the ordinary's office of said county.

Witness my hand and seal of the office this 14th day of October, 1880.

J. A. HOWARD, *Ordinary.*

GEORGIA, *Bartow County:*

Know all men by these presents that we, Frank P. Gray, as principal, and A. P. Wofford, John S. Leake, Thomas W. Leake, F. M. Ford, John W. Gray, N. Gilreath, Abda Johnson, as securities, are held and firmly bound unto J. A. Howard, ordinary of said county, and his successors in office, in the just and full sum of one hundred and forty thousand dollars; for the payment of which sum to the said ordinary and his successors in office we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 6th day of May, 1878.

The conditions of the above bond are such that whereas 1139*l* Frank P. Gray gave bond and security as the sole administrator of Lewis Tumlin, deceased, for the sum of one hundred and forty thousand dollars, said bond dated 13th day of October, 1877; and whereas Noah King, one of the securities of the said Frank P. Gray, as administrator as aforesaid on said administrator's bond, dated 13th October, 1877, filed an application for relief from all further liability on said administrator's bond in the court of ordinary of said county on the 12th day of February, 1878, on account of extreme old age and feeble health; and whereas at the March term of said court of ordinary, 1878, said court of ordinary passed an order relieving said Noah King, as security, from all further liability on said bond, and requiring said Frank P. Gray to give new bond and security in the sum of one hundred and forty thousand dollars:

Now, if the above-bound Frank P. Gray shall well and truly administer all the goods and chattels, rights and credits, lands and tenements, of the said Lewis Tumlin, deceased, which remain to be administered and which have or shall come to the hands, possession, or knowledge of the said Frank P. Gray, or in the hands or possession of any other person or persons for him, and the same do exhibit in the said court of ordinary when he shall be thereunto required, and such goods, chattels, and credits do well and truly administer according to law, and do make a just and true account of his actings and doings therein when he shall be thereunto required by the court of ordinary of said county, and all the rest of the goods, chattels, and credits which shall be found remaining upon the accounts of said administration, the same being first allowed by the court, shall deliver and pay to such person or persons, respectively, as are entitled to the same by law, and if it shall hereafter appear that any last will and testament was made by said deceased, and the same be proven before the court, and the executor obtain a certificate of probate thereof, and the said Frank P. Gray do in such case, if required, render and deliver up said letters of administration, then this bond to be void; else to remain in full force.

FRANK P. GRAY, [L. S.]
A. P. WOFFORD, [L. S.]
JOHN S. LEAKE, [L. S.]
THOS. W. LEAKE, [L. S.]
By A. P. WOFFORD,
Their Attorney-in-Fact.
F. M. FORD. [L. S.]
J. W. GRAY, [L. S.]
By his attorney-in-fact, A. P. WOFFORD.
N. GILREATH. [L. S.]
A. JOHNSON. [L. S.]

Attested and approved by—
J. A. HOWARD, *Ordinary.*

STATE OF GEORGIA, *Bartow County:*

I, J. A. Howard, ordinary in and for said county, do hereby certify that the within is a full, true, and complete copy of the administrator's bond of Frank P. Gray, administrator of Lewis Tumlin, deceased, dated 6th day of May, 1878, as appears of file in the ordinary's office of said county.

Witness my hand and seal of this office 14th day of October, 1880.

J. A. HOWARD, *Ordinary.*

STATE OF GEORGIA, *Bartow County:*

To Frank P. Gray, Cora M. Gray, John W. Gray, N. B. Tumlin, Abda Johnson, William T. Wofford, J. C. Wofford, A. P. Wofford, James M. Veach, Edwin M. Price, Noah King, John S. Leake, Thomas W. Leake, Thomas Tumlin, A. C. Trimble, Joel H. Dyer, W. W. Rich, Nelson Gilreath, John J. Howard, R. L. Rogers, W. I. Benham, F. M. Ford, all of said county; A. W. Mitchell, of the county of Fulton; Henry C. Ramsaur, administrator on the estate of L. R. Ramsaur; J. G. B. Erwin, and Henry C. Erwin, all of the county of Gordon, Greeting:

For certain causes, to be made known by the bill of complaint of Lula T. Lyon for account, etc., filed in the clerk's office of the superior court of said county, on the chancery side of said court, in which the said Lula T. Lyon is complainant and you are the defendants—

We command you that, laying all other business aside, *that* you be and appear before me, at our superior court, to be held in and for said county on the second Monday in January next, to answer unto all such matters and things as then and there may be charged against you, and to stand to and abide such further order and decree as may be had in the premises.

Witness the Honorable C. D. McCutchen, judge of said court, this December 10, 1880.

F. M. DURHAM, *Clerk.*

1140 10th Int'y. Have you not each a copy like this in your possession; if so, attach it to your answers, and if you cannot state, why not?

11th —. Examine the annexed printed paper or pamphlet and state whether you did not read the same at — same time, in December, 1880, or Jan'y, 1881.

12th Int'y. Look specially at that part of it in brackets on the 2d and 3d pages, beginning at 19th line of 2d page and ending at the 11th line of 3d page, and say if you did not then read that allegation in a printed paper served on you.

13th Int'y. Look also on "Exhibit B" to said bill, as printed on page 17 of the annexed pamphlet, and the printed signatures on page 18, and state if such printed exhibit was not to the bill served on you at the instance of Lula T. Lyon.

GRAHAM & GRAHAM,
Compl'ts' Solicitors.

"EXHIBIT A."

GEORGIA, *Gordon County:*

Know all men by these presents that I, John G. B. Erwin, of the county and State aforesaid, do hereby appoint Henry C. Ramsouer, of the county of Bartow & State —, my lawful attorney to sign my name as security on a bond to be given by J. A. Erwin & F.
1141 P. Gray, administrators on the estate of Lewis Tumlin, late of Bartow Co., dec'd, for six hundred thousand dollars for the purposes therein expressed in said bond, and my name so signed under this power of attorney shall be as binding on me as if I had personally signed the same.

J. G. B. ERWIN.

This 22 July, 1875.
A. J. HUTCHISON, *J. P.*

Recorded in book of bonds, page 341, August 4th, 1875.
J. A. HOWARD, *Ordinary.*

1142 *Bill.*

STATE OF GEORGIA, *Gordon County:*

In Circuit Court of U. S. for Northern District of Georgia.

J. L. RICE & WIFE *vs.* F. P. GRAY *et al.*

By virtue of a commission issuing out of the honorable circuit court of the United States for the northern district of Georgia, to us directed, we have caused J. G. B. Erwin and H. C. Erwin, the witnesses in said commission named, to come before us, and, being duly sworn true answers to make to the interrogatories to said commission annexed, depose and answer as follows:

To the first int'y witnesses answer: At Fairmount, in Gordon county, Georgia.

To second int'y both witnesses answer: About fourth cousin.

To 3d int'y witnesses answer: They each signed a power of attorney similar to copy annexed to interrogatories, at Fairmount, at instance of John A. Erwin. The power of attorney signed differed from the copy annexed to interrogatories in that the ones signed by witnesses did not have the words "as one of the" stricken and the words "& F. P. Gray" interlined. J. A. Erwin wrote the powers of attorney.

1143 To 4th int'y both witnesses answer: The power of attorney annexed to interrogatories marked "A" is a true copy of the power signed, except as to the erasion of the words "as one of the" and the interlineation of the words "& F. P. Gray."

To 5th int'y both witnesses answer: Changes were made, to wit, the words "as one of the" were erased and the words "& F. P. Gray" interlined, and without the knowledge, consent, or authority of witnesses.

To 6th int'y H. C. Erwin answers: I went with Judge McCutcheon from Calhoun on the 10th day of Sept., 1883, to Cartersville to examine the papers in the office of ordinary. We found those powers of attorney, to wit, one signed by myself, one by J. G. B. Erwin, and one by L. A. Ramsouer, and the changes indicated in answers to the 4th & 5th interrogatories had been made in each one of them. On that, the 10th day of September, was the first information or knowledge I had of any change or alteration in the powers of attorney.

To 6th int'y J. G. B. Erwin answers: The first information I had of any change in the power of att'y signed by myself or any
1144 one else was after the return of my brother, H. C. Erwin, and Judge McCutcheon from Cartersville on the 10 day of last Sept'r. That was the only power of attorney I ever saw or signed.

[On margin]: Objected to; ruled out.

To 7th int'y J. G. B. Erwin answers: Before I signed that power of attorney John A. Erwin came to my house for the purpose of getting me to sign his bond as an administrator of Lewis Tumlin's estate. He told me that he and Frank P. Gray were going to administer on the Tumlin estate. I told him (J. A. Erwin) that Frank Gray was a young man and wild; that one or more challenges had passed between him and others, and for these reasons I would not sign a bond for Gray, but had no objection to signing — bond for him (J. A. Erwin). John A. Erwin then told me was making up his own bond—getting his own bondsmen, and that Gray was getting his; and he further said that, in order to give a good bond, he thought best to get his relatives to sign first, and for that reason he came to see me and my brother and to his bro.-in-law, L. R. Ramsaur-. I never did sign in any other view than simply as J. A. Erwin, bondsman.

1145 To 1st int'y both witnesses answer: They had no knowledge or information of any alteration or change in the powers of attorney till the time indicated in their answers to 6th direct interrogatory, to wit, on 10th Sept'r last, and after John A. Erwin did not inform either of the witnesses that the change or alteration had been made. H. C. Ramsauer never informed either of the change or alteration. Witnesses cannot say that they concealed the change; they were not informed of it.

To 2d X int'y J. G. B. Erwin answers: J. A. Erwin told me, as I have before answered, when he came to get me to go upon his bond, that he and Gray were going to administer—not that they had obtained letters of administration. I heard from various sources afterwards that Erwin and Gray did obtain letters of administration.

I saw John A. Erwin occasionally during the time he was
1146 acting as an administrator, but don't recollect that he ever mentioned the object of his administration. I heard frequently that he and Gray were administrators on the estate of Tumlin.

To 2d X int'y H. C. Erwin answers: John A. Erwin did not tell me that he and Gray had obtained letters of administration on

Tumlin's estate; I heard from various sources that they did. I saw Erwin very seldom after his appointment, or while he was acting administrator. I had heard that they were winding up that estate.

To 3d X int'y J. G. B. Erwin answers: I saw Erwin occasionally during the period mentioned; don't know how often; lived twenty miles off. I never heard him speak of the administration. I know I had signed a letter of attorney authorizing my name to be signed to his bond. I did know, from general hearsay, that Gray was acting with him.

To 3d X int'y H. C. Erwin answers: I can't tell; don't know; don't know that I saw him at all during the period mentioned in interrogatory; never hea-d him speak of the administration.

1147 I knew I had authorized my name signed to his bond. I heard Gray was acting as administrator also.

To 4th X int'y both witnesses answer: They only know that they, by power of attorney, had authorized their names to be subscribed to a bond for J. A. Erwin, as one of the administrators of Lewis Tumlin's estate; that Gray and Erwin were to be, as they heard, and never did know, nor do they now know, but that each administrator could make his individual bond, provided his sureties were considered able to secure the estate.

To 5th X int'y both witnesses answer: They did not.

To 7th X int'y both witnesses answer: They knew and know that they had authorized their names to be signed as securities upon a bond for John A. Erwin; that the bond, as recited in the letter of att'y, was to be for $600,000.00.

To 8th X int'y both witnesses answer: They know of no probable liability on bond of both to complain about; that they had only agreed to become sureties for Erwin, and were never informed

1148 that they were subscribed as sureties upon bond of both.

To 9th X int'y both witnesses answer: Such paper was served on them in December, 1880, or in January, 188–; they did.

To 10th X int'y both witness answer: They each had a copy, but cannot attach them for the reason that they have been destroyed, lost, or mislaid and cannot be found.

To 11th X int'y both answer: They did.

To 12th X int'y both witnesses answer: They did.

To 13th X int'y both answer: They did.

J. G. B. ERWIN.
H. C. ERWIN.

Answered, sworn to, & subscribed before us this 17 day of Oct., 1883, at Calhoun, Gordon Co., Georgia.

W. R. RANKIN, [L. S.]
Commissioner.
J. D. TINSLEY, [L. S.]
Commissioner.

1149 *App'l of John A. Erwin for Leave to Resign as One of the Adm'rs of Lewis Tumlin, Dec'd.*

Bartow Superior Court.

JOHN A. ERWIN, Adm'r on the Estate of Lewis Tumlin, Deceased,

vs.

FRANK P. GRAY, Adm'r Mary L. Tumlin, *et al.*

On appeal from the court of ordinary.

Trial, and verdict rendered for pl'ff, John A. Erwin, at July term, 1876.

Now, in Bartow superior court, January term, 1884, comes Luke L. Peake, who is the duly appointed adm'r on the estate of John A. Erwin, late of Rhea county, in the State of Tennessee, dec'd, and says that the said John A. Erwin, the intestate of movant, was a resident of the county of Rhea, State of Tennessee, at the time of his death, and that movant's intestate, said John A. Erwin, was the same identical John A. Erwin who was the applicant for leave to resign his office as one of the administrators on the estate of Lewis Tumlin, dec'd, in the case above stated.

And movant shows and says that said John A. Erwin's application for leave to resign his office as one of the administrators on the estate of Lewis Tumlin, deceased, was duly filed in the court of ordinary of Bartow county, citation was duly issued, and the
1150 heirs and distributees of said estate came into said court of ordinary and resisted his said application, and at the term of said court of ordinary (1876) said court of ordinary granted this application and allowed his resignation, from which judgment of the court of ordinary an appeal was taken by some of the heirs and distributees of said estate to the superior court; that the heirs who entered said appeal were Lula T. Lyon, Napoleon Tumlin, Mary L. Tumlin, of said county, and Ada S. Rice, of the State of Tennessee; that the other heirs of said estate, to wit, George Henry Tumlin, Lewis T. Erwin, and Cora Gray, did not enter and appeal from said judgment of the court of ordinary; that said Mary L. Tumlin was the widow of said Lewis Tumlin, dec'd, and said Lewis T. Erwin was the only child of Mrs. Erwin, the deceased daughter of said Lewis Tumlin, dec'd; the other heirs named were the children of said Lewis Tumlin, dec'd; that, pending said appeal in Bartow superior court, said Mary L. Tumlin, on her own motion, caused her name by order of court to be stricken — as one of the appellants in said case at the July term, 1876. Said cause was determined by a jury on the trial by a verdict in favor of said John A. Erwin, which verdict was duly entered, as now appears upon the minutes of this court, and on which verdict a judgment was then and there entered and signed *up* upon the original papers
1151 in said case by Warren Aiken & Son, att'ys for said John A. Erwin, as movant has reason to believe; that at the same time the appellants applied for and obtained from this court an or-

der allowing them — days within which to prepare an motion for new trial and to file a brief in said case; that the time allowed by said order expired without any motion for new trial being made or brief of evidence being filed, and no further step being taken by said appellants, nor proceedings had in this court in said case; and movant shows to this court that the appeal papers in said case have never been recorded by the clerk of this court, and that the same have been lost from the clerk's office, and movant files herewith a copy of said appeal papers and the judgment, signed, the verdict in said case, marked Exhibit "A," which he moves court to establish in lieu of the lost original; if movant should be unable to satisfy the court that the judgment alleged to have been entered upon said verdict was not, in fact, so entered by the att'y of the said John A. Erwin and signed, then he moves that the balance of the record and papers in said case herewith filed be established by order of this court in lieu of the lost original, the same being the copies of said original, and that the court now enter or allow to be entered a judgment *nunc pro tunc* upon such verdict, in accordance with the
1152 true meaning and legal effect of the same; and if this court deems it proper that notice be served of this motion upon the applicant in said case on all the heirs of Lewis Tumlin, dec'd, movants pray- that an order *nisi* be granted requiring them to show cause, at such time as the court may direct, why the order asked for by movants should not be granted by this court. One of said heirs, to wit, Ada S. Rice, resides in Nashville, State of Tennessee, and G. S. Tumlin, Esq., of this county and State, was the att'y of appellants of record in this case, and movant prays, as she resides beyond the jurisdiction of this court, that service of this application be perfected by serving notice upon her counsel.

And movant shows that James M. Neil, Esq., is the only legal representative of the estate of Lewis Tumlin, dec'd, he having possession of said estate in the capacity of receiver.

And movant prays notice be given to said Neil, so that he may, if he elects so to do, come in and resist this application.

P. L. MYNATT,
C. D. McCUTCHEN,
MILNER AND HARRIS,
Att'ys for App'l.

Bartow Superior Court. January Term, 1884.

On reading the foregoing application it is ordered by the court that all the heirs and distributees named in said application
1153 do show cause before me at the present term of the Bartow superior court, on the 9th day of Feb'y, 1884, or before such judge as may be then presiding and qualified to try the same, why the record in said case should not be established in lieu of the lost original papers, and why the judgment *nunc pro tunc* should not be entered up upon said verdict as prayed for, and that service be perfected on the parties aforesaid or on the attorneys of the parties in said appeal suit, and that said James M. New, receiver, *he* be also

served so as to afford him notice that he may appear and resist if he elects so to do, and if for any reason this cause cannot be heard for the want of time to perfect service, then to be heard as soon thereafter as service can be perfected and counsel can be heard at any adjourned or subsequent term of this court.

Granted in open court Feb'y 2d, 1884.

J. B. ESTES,
J. S. C., N. E. C.

Minutes F, pages 500, 501, & 502.
Filed in office Feb'y 2d, 1884.

F. M. DURHAM,
Cl'k S. C.

1154 EXHIBIT "A."

GEORGIA, *Bartow County:*

Court of Ordinary, Bartow County. Regular Term, May 1st, 1876.

To the ordinary of said county:

The petition of John A. Erwin, of said county, showeth that Frank P. Gray, of said county, and your petitioner were appointed administrators on the estate of Lewis Tumlin, deceased, late of said county, who died in said county intestate, and that letters of administration issued to said Frank P. Gray and your petitioner on the first day of August, 1875; that said Lewis Tumlin left as his heirs-at-law and distributees of his estate his widow, Mrs. Mary L. Tumlin, Napoleon Tumlin, Mrs. Lula T. Lyon, wife of Thomas J. Lyon, Mrs. Cora Gray, wife of Frank P. Gray, George Henry Tumlin, a minor, and Lewis T. Erwin; that Mrs. Cora Gray is a minor, and that her husband, Frank P. Gray, is her guardian; that your petitioner has been regularly appointed and qualified, and given bond and security as guardian of George Henry Tumlin and Lewis T. Erwin, and that all of said heirs-at-law and distributees of the estate of said Lewis Tumlin, dec'd, reside in said county; that Ada S. Rice, wife of James L. Rice, who resides in Nashville, in the State of Tennessee, is also one of the heirs-at-law of said Lewis Tumlin and distributee of his estate, and your petitioner is
1155 in bad health, and from his physical infirmity is unable to give that attention to the management of said estate that he otherwise would and that he ought to give as administrator; that most of the real estate belonging to said estate and — great portion of the personalty has been divided and delivered to the distributees of said estate; that Frank P. Gray, the co-administrator of your petitioner, is willing to give new bond and carry on said administration of said estate alone. Your petitioner therefore prays that he be permitted to resign his office of administrator on the estate of said Lewis Tumlin upon a full and complete compliance with the law in such cases made and provided; and your petitioner prays that each of said heirs-at-law of said Lewis Tumlin hereinbefore named may be cited by your honor to be and appear before your honor on the first Monday in May next, then and there to show cause, if any they have, why your petitioner should not resign his office of ad-

ministrator as aforesaid on his complying with the law in such case made and provided.

And your petitioner will ever pray, &c.

April 11, 1876.

JOHN A. ERWIN.

GEORGIA, *Bartow County:*

ORDINARY'S OFFICE.

To Mrs. Mary L. Tumlin, Napoleon Tumlin, Mrs. Lula T. Lyon, Frank P. Gray, and all other persons named in the foregoing
1156 petition as heirs-at-law and distributees of the estate Lewis Tumlin, dec'd, and to the guardians of the minors named in said petition:

You are hereby cited and required to appear at the court of ordinary to be held on the first Monday in May next, then and there to show cause, if any you have, why John A. Erwin, one of the administrators on the estate of Lewis Tumlin, dec'd, should not be permitted to resign the office as administrator of said estate for the cause set forth in said petition when the law in such cases made and provided is fully complied with; and it is further ordered that each of said heirs-at-law who are of full age and the guardians of the minor heirs be served with a copy of the foregoing petition and this citation, unless they should acknowledge service ten days before the term appointed for hearing said petition and passing on the same.

Given under my hand and seal of office this April 11, 1876.

J. A. HOWARD, *Ordinary.*

Filed in office April 12, 1876.

Due and legal service — hereby acknowledged of the within petition and citation and further service waived.

April 13th, 1876.

JOHN A. ERWIN,
Guard. for G. H. Tumlin.
JOHN A. ERWIN,
Guard. for L. T. Erwin.
1157 FRANK P. GRAY, *Adm'r.*
FRANK P. GRAY,
Guard. for Cora Gray.

I acknowledge service of the within petition this April 17, 1876.

ADA S. RICE.
MARY L. TUMLIN.
N. TUMLIN.

Due and legal service of the within petition and citation is hereby acknowledged and further service waived.

April 20, 1876.

MARY L. TUMLIN.
N. TUMLIN.

Served Mrs. Lula T. Lyon in person with a copy of the within petition and citation.
April 20, 1876.

G. L. FRANKS,
Dep'ty Sh'ff.

GEORGIA, *Bartow County:*

In person came before me, J. A. Howard, ordinary of said county, Harry J. Erwin, who, being duly sworn, on oath says that he did, on the 17th day of April, 1876, hand a copy of the foregoing and annexed petition of John A. Erwin and a copy of the citation, signed by the ordinary, J. A. Howard, to Mrs. Ada L. Rice in
1158 person, a daughter of Lewis Tumlin, late of said county, deceased, and at the said time said Mrs. Ada S. Rice wrote the following on said original, to wit: "I acknowledge service of the within petition this April 17th, 1876," and then and there signed her name to the same.

HARRY J. ERWIN.

Sworn to and subscribed before me this 1st day of May, 1876.
J. A. HOWARD, *Ordinary.*

I, Frank P. Gray, one of the administrators of Lewis Tumlin, deceased, do hereby signify my willingness for John A. Erwin, my co-administrator of said estate, to resign for the reason set forth in his petition, I retaining the sole administration in my own name; and I do hereby propose to file such bond in furtherance of the same as the ordinary may deem proper in the premises.
Done this the 1st May, 1876.

FRANK P. GRAY,
Adm'r of Lewis Tumlin, Dec'd.

Filed in office May 1st, 1876.

J. A. HOWARD, *Ordinary.*

1159 *Application of Administrator to Resign the Administration.*

JOHN A. ERWIN, One of the Adm'rs of Lewis Tumlin, Dec'd,

vs.

FRANK P. GRAY, Adm'r, FRANK P. GRAY, Guard, Mary L. Tumlin, Napoleon Tumlin, *et al.*, Heirs-at-Law, &c.

Upon considering the above and foregoing application of John A. Erwin, one of the administrators on the estate of Lewis Tumlin, dec'd, late of said county, for leave to resign his said office of administrator, and all the heirs-at-law of Lewis Tumlin having been duly served with citation to show cause why John A. Erwin should not be allowed to resign the office of administrator on the estate of Lewis Tumlin, dec'd, and all of said heirs being represented now before the court, and no sufficient cause being shown why said Erwin should not be allowed to resign his trust as administrator as aforesaid, and it appearing to the court that the bodily health, physical infirmity, and the health of his wife are such that he is unable to

give his attention to the management of the business of said estate, and Frank P. Gray being cited to appear before the court, and having been served with said citation and now coming before the
1160 court and expressing a willingness to accept the office of administrator of the estate of Lewis Tumlin, dec'd, and it appearing to the court that the allowing of said Erwin to resign his office of administrator will not injure the interest of said estate in any way, it is, therefore, ordered and adjudged by the court that the resignation of the said John A. Erwin of the office of administrator on the estate of said Lewis Tumlin, dec'd, be, and the same is hereby, allowed; and it is further ordered by the court and adjudged by the court that Frank P. Gray, the co-administrator of the said John A. Erwin upon the estate of the said Lewis Tumlin, dec'd, be, and he is hereby, appointed and declared the sole administrator of the estate of the said Lewis Tumlin, dec'd, and the said Frank P. Gray is hereby required to give a new bond and security for the faithful administration of said estate in the sum of one hundred and forty thousand dollars, and upon said bond and security being given, and the said John A. Erwin, upon his settling and accounting with Frank P. Gray, the sole and remaining administrator of the estate of Lewis Tumlin, dec'd, his successor, of his accounts as administrator, and the filing the receipt of his successor in the ordinary's office as provided by law, and, upon so doing, that the said John A. Erwin, as administrator, and his securities be, and they are hereby, discharged from any and all liability for any mismanagement of said estate in the future, but not from any past liability of said John A. Erwin, as administrator as aforesaid.

Granted in open court, May term, 1876.

J. A. HOWARD, *Ordinary.*

Application to Resign the Administration, &c.

JOHN A. ERWIN, Adm'r of the Est. of Lewis Tumlin, Dec'd,

vs.

FRANK P. GRAY, Adm'r FRANK P. GRAY, Guard., Mary L. Tumlin, *et al.*

And now comes the defendant heirs-at-law and distributees of the estate of Lewis Tumlin, dec'd, late of Bartow county, and says that the prayer of petitioner, John A. Erwin, one of the administrators on said estate, should not be allowed; and, further, defendants say that if the same is allowed and granted that Frank P. Gray is not a fit and proper person to be appointed as sole administrator upon said estate. They suggest the name of Rev. T. E. Smith as a proper person to appoint should said Erwin be allowed to resign, &c.

G. C. TUMLIN ET AL.,
Att'ys for M'v'ts.

Filed in office May 1st, 1876.

J. A. HOWARD,
Ordinary B. C.

1162 At — term, 1876, of Bartow superior court the following verdict was rendered by the jury trying said case stated, to wit:

Application for Leave to Resign, &c.

JOHN A. ERWIN, Adm'r on Est. of Lewis Tumlin, Dec'd,
vs.
FRANK P. GRAY, Adm'r Mary L. Tumlin, *et al.*

We, the jury, find in favor of John A. Erwin and that his resignation be allowed.
Aug. 4, 1876.

T. H. STALL, *Foreman.*
B. F. GODFREY.
J. J. CALHOUN.
WM. M. LOVELESS.
ED. E. LEWIS.
MEREDITH ANDERSON.
STEPHEN S. SAGGERS.
PLEASANT S. SHELLMAN.
PETER MARSH.
WM. W. MORRIS.
A. C. DAY.
H. E. WOLFE.

STATE OF TENNESSEE, *Rhea County:*

January Term, 1883. Quarterly Court for the County of Rhea.

TUESDAY, *Jan'y 8th*, 1884.

At the regular January term of the quarterly county court held in and for said county of Rhea, the court met pursuant to adjournment, and the following proceedings were had and entered of record:

This day came Luke L. Peak and asked to be appointed adm'r of the estate of J. A. Erwin, deceased; and, it appearing to the satisfaction of the court that you are the proper person to have the administration of said estate, *here* ordered that letters testamentary issue to you, which are in words and figures as follows:

1163 STATE OF TENNESSEE, *Rhea County:*

To Luke L. Peake, a citizen of Meigs county:

Whereas it appears to the court now in session that J. A. Erwin has died leaving no will, and the court being satisfied as to your claims to the administration of and you having given bond and qualified as directed by law, and the court having ordered that letters of administration be issued to you:

These are, therefore, to authorize and empower you, the said Luke L. Peake, to take into your possession and control all the goods, chattels, claims, and papers of the said intestate and return a true and perfect inventory thereof to our next county court, or within ninety days from the date hereof to collect and pay all debts and to do and transact all the duties in relation to said estate which

lawfully devolve on you as administrator, and after having settled up said estate to deliver the residue thereof to those who have a right thereto by law; herein fail not.

Witness J. T. Howard, clerk of said court, at office in Washington, Tenn., Rhea county, this the 8th day of January, 1884.

J. T. HOWARD,
Co. C't Clerk.

1164 Filed in office this Feb'y 16, 1884.

F. M. DURHAM,
Clerk S. C.

Served Lula T. Lyon and G. H. Tumlin each personally with a true copy of the within motion & rule *nisi* this Feb'y 5th, 1884.

CALEB GOODE,
Dep'ty Sheriff.

Served Napoleon Tumlin and James M. Neel, receiver of L. Tumlin's estate, each personally with a copy of the within motion and rule *nisi* this 6th Feb'y, 1884.

JOHN A. GLADDIN, *Sheriff.*

Served John S. Leake personally with a copy of the within original motion and rule *nisi* this Feb'y 8th, 1884.

JOHN A. GLADDIN, *Sheriff.*

I this day served Lewis T. Erwin personally with a copy of the within original *within* motion & rule *nisi.*

This 9 Feb'y, 1884.

JOHN A. GLADDIN, *Sheriff.*

STATE OF TENNESSEE, *Rhea County:*

1165 I, J. T. Howard, clerk of the county court of said county, do hereby certify the foregoing to be a true and perfect copy of the letters of administration issued by our county court at its regular January term, 1884, to Luke L. Peak, administrator of the estate of J. A. Erwin, deceased, as the same appears of record in my office.

Witness my hand and seal of said county, at office in Washington, Rhea county, Tenn., this Feb'y 5, 1884.

[SEAL.] J. T. HOWARD,
Co. C't Cl'k.

STATE OF TENNESSEE, *Rhea County:*

I, James Johnson, chairman and presiding magistrate of the county court of the county of Rhea and State of Tennessee, the same being a court of record, do hereby certify that J. T. Howard, whose genuine signature appears to the above certificate, is, and was at the date thereof, the clerk of the county court for said county, and that the above attestation of said clerk is in due form.

Given under my hand and official signature this 5 day of Feb'y, 1884.

JAMES JOHNSON,
Chairman and Presiding Magistrate of the County Court of Rhea County, Tennessee.

1166 GEORGIA, *Bartow County:*

Personally appeared before me W. H. Howard, who, on oath, says that he served Mrs. Ada Rice in person with a true copy of the within on the 4th day of February, 1884, by leaving a copy of the same with Mrs. Ada Rice.

W. H. HOWARD.

Sworn to and subscribed before me this Febr'y 5th, 1884.

SAM'L F. MELAIN,
N. P., B. C., Ga.

Due and legal service is hereby acknowledged. Copy & notice and all further service waived.
This Febr'y 4, 1884.

CORA M. GRAY.
F. P. GRAY.

Rec'd $24.00 as part costs in this case to date.
Febr'y 16, 1884.

F. M. DURHAM, *Clk.*

Rec'd of F. M. Durham, C. S. C., $8.00, my cost in part in this case.
Febr'y 18, 1884.

JOHN A. GLADDIN, *Sheriff.*

GEORGIA, *Bartow County:*

1167 Personally appeared before me W. J. Burnham, who, on oath, says that he served Mrs. Mary L. Tumlin, now Mrs. Mary L. Spencer, in person with a true copy of the within.
Febr'y 4, 1884.

W. J. BURNHAM.

Sworn to and subscribed before me this Febr'y 4, 1884.

W. H. HOWARD,
N. P., B. C.

Answer of Respondents.

LUKE L. PEAKE, Adm'r of J. A. Erwin, Dec'd,
vs.
J. M. NEEL, Rec'r of L. Tumlin's Estate, *et al.*, Heirs of said Estate.

Separate answer of J. M. Neel, receiver.

He submits to the court that as a receiver of the United States circuit court for the northern district of Georgia that movant has no right without the leave of the court appointing him to make him a party defendant or respondent to said motion and thus involve him in litigation and make him liable for costs, and he asks to be discharged with his reasonable costs, &c.

J. M. NEEL,
By his att'ys, E. D. GRAHAM &
W. K. MOORE.

And Ada S. Rice, George H. Tumlin, Mary L. Spencer, Napoleon Tumlin, and Mrs. Lula T. Lyon, for cause why said judgment
1168 should not now be entered *nunc pro tunc*, answering, say and submit as follows: That if said movant is the administrator of John A. Erwin, deceased, they have no knowledge of it, and they say no legal evidence of his being such adm'r was filed on or before the granting of the order *nisi* in them, as they are advised and believe it was necessary for him to have done before the commencement of this proceeding. This being, as respondents believe, a summary proceeding, respondents further say that the application of John A. Erwin was a personal application to resign an office, and that the proceeding died with him at his death, and cannot be revived for any purpose. Respondents further say that the estate of John A. Erwin does not show how it has (and they charge that it does not in fact have) any interest in this matter at all; that there is no suit pending in Geo. or elsewhere, either for or against his estate, where the proposed judgment could be used as evidence; and respondents say that the said adm'r on the estate he represents has no interest in this matter and are not the moving parties in this proceeding, and that the facts are there is a suit pending in the United States circuit court for the northern district of Georgia in favor of respondents against Frank P. Gray, who was the co-administrator of John A. Erwin, and in whose favor said Erwin resigned, and
1169 the securities who signed the first bond of Gray and Erwin as adm'rs of L. Tumlin, and that said sureties have employed counsel to make this motion in order to make it appear that Erwin resigned in 1876, the intention being in this proceeding to make testimony in their favor on the trial of the cause in the said United States circuit court in this unusual way; and respondents distinctly say that J. A. Erwin was not and is not now a party to said last-mentioned suit, but that counsel for the sureties have written to and obtained the consent of said adm'r of John A. Erwin in order to use his name to make testimony for their clients, the sureties aforesaid.

Respondents do not positively deny that the heirs and distributees of said estate of Lewis Tumlin, dec'd, came into court and resisted the application of J. A. Erwin for discharge before the ordinary. Respondents say that three of said heirs or distributees, to wit, George Henry Tumlin, C. T. Erwin, and Cora Gray, were minors and under the age of 21 years at the time of filing said application and also at the time the verdict was rendered in said cause in the superior court of Bartow county, Georgia, at the July term, 1876, and that the petition of said J. A. Erwin carefully sets out the names of their guardians, and the citation is directed to said named guardians, and that it is evident from the whole proceedings that it was the intention of the guardians to appear and represent their
1170 wards in a proceedings w-ere their own interests were inimical to the rights and interest of said wards. John A. Erwin was seeking to lay aside a trust and an office which he had voluntarily assumed and to cast it upon Frank P. Gray, who was willing to accept it, and yet no notice was ever given or intended to be given to the three minors whose estate was put in peril by the proposed —.

Respondents deny that there ever was sufficient or legal service on said minors in said cause, or that they were ever parties in any suit to said proceedings, or that they ever had an opportunity to be parties, or that any guardian *ad litem* was appointed for them or either of them; and George Henry Tumlin says that he was never served with citation and never appeared or plead to said proceedings, and this is the first time he has had an opportunity to be heard upon said question. Respondents refer to the record attached to movant's rule *nisi* and say that it shows that the citation was not served upon these minors, but that J. A. Erwin for G. H. Tumlin and L. T. Erwin and F. P. Gray for Cora Gray acknowledged for their wards due and legal service and waived further service, and that this was done in a case where both Gray and Erwin had an interest or supposed interest to subserve adverse to their wards, and where it was unreasonable to expect that they would or
1171 could be controlled by the interest of their wards; they could not sue their wards in their own favor, acknowledge service, and confess judgment without their knowledge and bind them by such action.

Respondents say that personal notice should have been given each of said minors, they being about 14 years of age, and in a return of each service a guardian *ad litem* could and would have been appointed, and that said minors could then have become parties to said proceedings and as such bound thereby. Respondents insist that the resignation of an administrator is conditional upon his procuring a suitable person to act in his place, and the next of kin are each and every one entitled to notice and to be heard fully on that question. Respondents insist that the resignation of an administrator, if good for one purpose must be good for all, and that one administrator cannot — sworn in office with power to act as such to some of the heirs and be out of office as to the others; and respondents insist that as the record produced shows that there were minors next of kin who were not properly served nor made parties to said issue, that no legal judgment could have been rendered on said verdict in the year 1876, and that none can be rendered now. The court is asked to allow to be done now what movant says ought to
1172 have been done in the year 1876. And respondents deny that any judgment ever could have been legally rendered upon this verdict, obtained without service on the necessary parties.

Respondents do insist, positively deny, that a judgment was ever signed up by Col. Aikin or any one else in this case. They believe a motion was made some two or three years ago in J. A. Erwin's name for leave to enter a judgment for the 1st term and make it relate back to the verdict, and this motion was abandoned, and the fact of making it is not consistent with the present suggestion of movant that one was ever signed.

Respondents deny this suggestion and ask that an issue of fact may be made up and tried if movants desire to press it.

Respondents further say that it is now *should* that J. A. Erwin, while in life, now desires to sign up judgment—this verdict—or to have it done, and no reason is given to account for the long delay

in this matter and no suggestion is made in said motion as to any reason the adm'r has now for desiring the asked for interposition of the court. How has it become necessary at this late day to have this judgment speak as if pl'ff or his counsel had never been guilty of laches?

Respondents are advised and believe that the court will not do a vain thing, and that while courts have ample power in proper cases to complete and amend its records, still it is a matter of dis-
1173 cretion, and the court may refuse and will refuse when the party moving gives no excuse for neglect and shows no reason for the court's acting.

It is true, as stated in movant's petition, that the other heirs, meaning said minors, did not enter an appeal to the superior court; they were not served—were not parties. How could they appeal? They would not even bind themselves by signing an appeal bond, and it is certain that neither of their guardians entered an appeal for them, or, as the record shows, call for or respond with their interest in the matter. Respondent further insists that, in order to give this court the right and power to act in the premises at all, movant must show that the cause was legally brought to this court, so as to give jurisdiction to this court, and for the facts herein stated and for the reason given respondent asks that said motion be denied, and that said rule *nisi* be discharged, and that said verdict be arrested and set aside. And for further answer respondents, and especially the said G. H. Tumlin, says and shows for cause why said judgment should not now be entered *nunc pro tunc*, as prayed for, that they are advised and believe that administration ought always by law to be vested in such person or persons as are first entitled to the estate, or such person or persons as may be selected by those entitled to the same or a larger part thereof; and these respondents say that said administration was originally
1174 vested in the said John A. Erwin and the said Frank P. Gray, as co-administrators, by reason of their selection by all or a majority of the said heirs. Said Gray was the husband and was to be the guardian of said Cora M. Gray, one of the minor heirs, and was appointed such guardian on Oct. 4, 1875, and said Erwin was appointed the guardian of said minors, George H. Tumlin and Louis T. Erwin, on 5 day of July, 1875, and before his appointment as administrator, which appointment as administrator was made on the 2d day of August, 1875; and respondents are advised that the resignation of administration and acceptance of the resignation by the court of ordinary and by the superior court in the time of appeal from that court is a matter in the discretion of the court, looking to the interest of the bond—looking to the interest of the estate; and respondents insist that the said Erwin and Gray, claiming to represent as guardians three-sevenths of said estate, and in the name of these three minors not legally represented, consenting to the said resignation, and that the sole administration should be cast on said Gray, mainly induced said judgment in the court of ordinary and said verdict in the superior court, whereas these respondents, and especially the said George H. Tumlin, insists that if said

minors had been properly made parties to said proceedings, and had been represented before said court by a guard-
1175 *ad litem*, they could have successfully resisted said resignation and procured said verdict, and the said George Henry Tumlin insists that no judgment *nunc pro tunc* should be entered thereon; and, for further cause why said motion should not be allowed, respondents say that said Frank Gray and John A. Erwin were co-administrators, and at the time of filing of said petition by said Erwin for leave to resign they had in their joint custody and control of the personal assets of said estate of Lewis Erwin, in money and solvent debts, at least one hundred thousand dollars, and that afterwards, pending said appeal and before the trial thereof, said John A. Erwin surrendered all of said personal assets into the sole custody of his co-administrator, said Gray, and at the time of the rendition of said verdict said Gray had said assets in his hands; and respondents say that since the rendition of said verdict and before the death of said Erwin or any application or effort to enter said judgment, *nunc pro tunc* or otherwise, said Gray invested of said personal assets a large part, to wit, not less than forty thousand dollars, and these respondents are advised and believe that the discharge of the administrator by resignation is an act of the law and is only perfect and complete when final judgment is entered in a court
1176 of competent jurisdiction allowing such resig-, and the object and effect of allowing a judgment to be entered *nunc pro tunc* on said verdict is to give the same relative — back to a time when said personal assets were in the hands of said Gray or Gray and Erwin and had not been wasted, in order to effect the liability of the sureties in this joint bond as administrators to the respondents for the wastes committed after the finding of said verdict, upon which said Erwin in his lifetime neglected to enter the judgment and thereby obtained his discharge from said joint administration and from his said office of administrator, and protect as far as they can the said sureties.

And respondents, having fully answered, pray to be herein discharged with their reasonable costs.

G. S. TUMLIN,
J. B. CONYERS,
W. K. MOORE,
GRAHAM & GRAHAM,
Resp'ts' Att'ys.

STATE OF GEORGIA, *Bartow County:*

In person came before — the undersigned George H. Tumlin, who on oath says the facts stated in the above and foregoing answers are true.

G. H. TUMLIN.

Sworn to and subscribed before me this 8 Feb'y, 1884
J. A. HOWARD, *Ordinary.*

1177 And, for additional and further cause why said judgment prayed for by movants should not be allowed to be entered, respondents show that no judgment can be entered, either now or for then, except a judgment allowing the resignation of said Erwin and vesting the sole administration in his proposed successor and co-administrator, upon his settling his accounts with and filing the receipt of such successor, who is required by law to be a party before the court and qualified, entitled, and willing to accept said trust; and respondents say that no such judgment can now be entered binding upon either said Erwin or said Gray or carried out by a mandate to said ordinary in the court of ordinary, because they say that since the finding of said verdict and before the making of this application to enter judgment thereon, to wit, about the first day of November, 1883, said Erwin died, and since the finding of said verdict, to wit, on the — day of November, 1881, the said Frank P. Gray, co-administrator of said Erwin, and the person suggested and cited as his successor, was, by the United States circuit court for the northern district of Georgia, remove- from said administrator and enjoined from intermeddling with said estate, and one James M. Neel was appointed receiver of said estate, and is now administering the same as such receiver under the direction and authority of said
1178 United States circuit court, and declines to be made a party to this proceeding, and cannot be so made by the process of this court. And respondents say that since the finding of said verdict no such settlement has been made or receipt obtained or filed with the ordinary, and it cannot now be done by reason of the death of said Erwin, the renewal of and injunction against said Gray, and the seizure of said estate by said United States circuit court and placing it in the hands of its receiver.

And for further cause respondents show that the judgment sought to be entered by movants ought not to be allowed, because they seek to enter a judgment "affirming the judgment of the court of ordinary in all things," when said judgment of the court of ordinary, removed to this court by appeal upon conditions therein recited, discharged all the sureties in the joint and several administration bond of the said John A. Erwin and Frank P. Gray as administrators on the estate of Lewis Tumlin, dec'd, from all the future liability in said bond without any application by said sureties to be so discharged, and when said petition by said Erwin for leave to resign contained no application for their discharge; and respondents are advised and believe that neither said court of ordinary nor this court, on the trial of this appeal or the hearing of this motion, has any
1179 power or authority in this case to enter any such judgment.

G. S. TUMLIN,
JAMES B. CONYERS,
W. K. MOORE,
GRAHAM & GRAHAM,
Att'ys for Respondents.

STATE OF GEORGIA, *Bartow County:*

In person appeared before me the undersigned, Mrs. Lulu T. Lyon, who on oath says that the facts stated in foregoing answer *is* true.

LULU TUMLIN LYON.

Sworn to and subscribed before me this 16th day of Feb'y, 1884.

SAM'L T. MILAM,
N. P., B. C., Ga.

And for further cause respondents say that before said trial in the superior court and the finding of the verdict in said case said ordinary accepted a new bond from said Gray, as sole administrator, pending said appeal, which bond, after said verdict and before their application to enter judgment, beeame wholly insolvent, and is now wholly insolvent, and no other bond was taken.

TUMLIN, CONYERS, MOORE,
GRAHAM & GRAHAM,
Att'ys for Resp'd'ts.

Filed in office Feb'y 16, 1884.

F. M. DURHAM, *C. S. C.*

1180 LUKE L. PEAK, Adm'r of John A. Erwin, Dec'd,

vs.

ADA L. RICE, MARY L. SPENCER, LULA T. LYON, & Others.

Motion to enter judgment *nunc pro tunc*, &c., and to establish lost paper, &c., in same case.

On hearing the above-stated motion it is considered and ordered that the papers and proceedings attached to the motion in this case and marked Exhibit "A" be, and the same *is* hereby, established in lieu of the lost original papers in the case, with the exception of the alleged copy of a judgment thereto attached purporting to have been signed up by Warren Akin & Son, it not appearing to the court that any judgment was in fact signed up by counsel in the verdict rendered by the jury in said case. And it is further considered and adjudged by the court that a judgment *nunc pro tunc* be now entered upon the motion of the said administration of John A. Erwin, deceased, as follows, to wit: That said John A. Erwin do recover a judgment on said verdict on the issues made in said appeal case, and that his resignation as one of the administrators of Lewis Tumlin, dec'd, be allowed, and the judgment of the court of ordinary allowing the same is hereby approved; and the court of ordinary is directed to carry the same into effect, this judg-
1181 ment to take effect as though it had been rendered at the term which the verdict was rendered, and is not to prejudice any party or person otherwise or to any greater extent than he or they would have been affected if the judgment had been rendered at the term when the verdict was found, and counsel for movant

may on this day sign judgment in said verdict in accordance herewith.

Feb'y 16, 1884.

J. B. ESTES,
J. S. C., N. E. C.

Minutes F, page 556.

January Adj'd Term, 1884.

FEBR'Y 16, 1884.

Whereupon it is ordered, considered, and adjudged by the court, in accordance with the order and judgment of the court this day rendered, that the said John A. Erwin do recover judgment in his favor on the issue made and that his resignation be allowed, and that the judgment of the court of ordinary allowing the same be, and the same is hereby, affirmed, and the court of ordinary is directed to carry the same into effect. This judgment to take effect as though it had been rendered at the term when the verdict was rendered, and is not to prejudice any party or person and otherwise or
1182 to any greater extent than he or they would have been affected if the judgment had been rendered at the term when the verdict was found.

R. L. MYNATT,
C. D. McCUTCHEN,
MILNER & HARRIS,
Movant's Att'ys.

Minutes F, page 556.

GEORGIA, *Bartow County:*

CLERK'S OFFICE, SUP'R COURT.

I, F. M. Durham, cl'k sup'r court of said county, do hereby certify that the within and foregoing contains a true and complete copy of the petition and rule *nisi*, Exhibit "A," and order to establish lost papers and order to enter judgment *nunc pro tunc* in the case of Luke L. Peake, adm'r of John A. Erwin, dec'd, *vs.* J. M. Neel, receiver of L. Tumlin, Lula T. Lyon, Ada S. Rice, *et al.*, and also a true copy of the answers of respondents, together with all entries thereto of all the proceedings, as of file and record in my office.

Witness my hand and the seal of office this Febr'y 25th, 1884.

F. M. DURHAM, *Cl'k S. C.*

1183 GEORGIA, *Bartow County:*

Know all men by these presents that I, A. C. Trimble, of the county and State aforesaid, have authorized, constituted, and appointed Gen'l Wm. T. Wofford, of said county and State, my lawful attorney-in-fact for me, and in my name do authorize and empower him to go before the ordinary of Bartow county and sign my name as security for Frank P. Gray and John A. Erwin on their bond required of them by law as administrators of Lewis Tumlin, dec'd; and, further, to do all things necessary to be done in and about the execution of these presents, hereby ratifying and confirming all that my said attorney may do in the premises.

In witness whereof I hereto set my hand and seal this 31st of July, 1875.

A. C. TRIMBLE. [L. S.]

Signed in presence of—
J. D. BOWDOIN,
N. P., ex Of. J. P.

Recorded in book of bonds, page 344, Aug. 4th, 1875.
J. A. HOWARD, *Ordinary.*

1184 GEORGIA, *Bartow County:*

Know all men by these presents that I, E. M. Price, of the county and State aforesaid, have authorized, constituted, and appointed Gen'l W. T. Wofford, of said county & State, my lawful attorney-in-fact for me, and in my name do authorize and empower him to go before the ordinary of Bartow county and sign my name as security for Frank P. Gray and John A. Erwin on their bond required by law as administrators of Lewis Tumlin, dec'd; and, further, to do all things necessary to be done in and about the execution of these presents, hereby ratifying and confirming all that my said attorney may do in the premises.

In witness whereof I hereto set my hand and seal this 30th day of July, 1875.

EDWIN M. PRICE.

Signed in presence of—
J. A. HOWARD, *Ordinary.*

Recorded in book of bonds, page 345, Aug. 4, 1875.
J. A. HOWARD, *Ordinary.*

1185 GEORGIA, *Bartow County:*

Know all men by these presents that I, J. W. Gray, of the county and State aforesaid, have authorized, constituted, and appointed Gen'l W. T. Wofford, of said county & State, my lawful attorney for me, and in my name do authorize and empower him to go before the ordinary of Bartow county and sign my name as security on the bond of Frank P. Gray & John A. Erwin, which bond being required of them by law as administrators of Lewis Tumlin, deceased; and, further, to do all things required and necessary in and about the execution of these presents, hereby ratifying and confirming all that my said attorney may do in the premises.

This July 31st, 1875.

JOHN W. GRAY.

Signed in the presence of—
J. D. BOWDOIN,
N. P., ex Of. J. P.

Recorded in book of bonds, page 343, Aug. 4, 1875.
J. A. HOWARD, *Ordinary.*

1186 GEORGIA, *Bartow County:*

Know all men by these presents that I, J. H. Dyer, of the county and State aforesaid, have authorized, constituted, and appointed Gen'l Wm. T. Wofford, of said county and State, my lawful attorney-in-fact for me, and in my name do authorize and empower him to go before the ordinary of Bartow county and to sign my name as security for Frank P. Gray and John A. Erwin on their bond required of them by law as administrators of Lewis Tumlin, dec'd; and, further, to do all things necessary in and about the execution of these presents, hereby ratifying and confirming all that my said attorney may do in the premises.

In witness whereof I hereto set my hand and seal this 31st of July, 1875.

JOEL H. DYER. [L. S.]

Signed in presence of—
J. D. BOWDOIN,
N. P. & ex Of. J. P.

Recorded in book of bonds, page 344, Aug. 4th, 1875.
J. A. HOWARD, *Ordinary.*

1187 STATE OF GEORGIA, *Bartow County,*

Know all men by these presents that I, A. W. Mitchell, of the county and State aforesaid, do hereby appoint John J. Howard, of the county of Bartow and said State, my lawful attorney to sign my name as security on a bond to be given by John A. Erwin & F. P. Gray as administrators of the estate of Lewis Tumlin, late of Bartow Co., Ga., deceased, for six hundred thousand dollars for the purposes therein expressed in said bond; and my name so signed by my attorney as above shall be as binding on me as if I had personally signed the same.

A. W. MITCHELL.

This — day of July, 1875.

H. C. LEONARD,
Notary Public, Fulton Co., Ga.

Recorded in book of bonds, page 342, Aug. 4, 1875.
J. A. HOWARD, *Ordinary.*

1188 GEORGIA, *Bartow County:*

Know all men by these presents that I, Noah King, of said county and State, have authorized, constituted, and appointed Gen'l W. T. Wofford, of said county & State, my lawful attorney-in-fact for me, and in my name do authorize and empower him to go before the ordinary of Bartow county and sign my name as security for Frank P. Gray and John A. Erwin on their bond required of them by law as administrators of Lewis Tumlin, dec'd; and, further, to do all things required and necessary to be done in and about the execution of these presents, hereby ratifying and confirming all that my said attorney may do in the premises.

In testimony whereof I have hereto set my hand and seal this 31st of July, 1875.

NOAH KING. [L. S.]

Signed in presence of—
J. D. BOWDOIN,
N. P. & J. P.

Recorded in book of bonds, page 343, Aug. 4, 1875.
J. A. HOWARD, *Ordinary.*

1189 GEORGIA, *Bartow County:*

Know all men by these presents that I, Robert L. Rogers, of the county & State aforesaid, do hereby appoint J. J. Howard, of the county and State aforesaid, my lawful attorney to sign my name as security on a bond to be given by John A. Erwin & F. P. Gray as administrator of the estate of Lewis Tumlin, late of Bartow county, Ga., dec'd, for six hundred thousand dollars for the purposes therein expressed in said bond; and my name so signed by my attorney as above shall be as binding on me as if I had personally signed the same.

ROBERT L. ROGERS.

This 2d day of August, 1875.

E. L. PEACOCK,
D. W. K. PEACOCK,
N. P., B. C.

Recorded in book of bonds, page 342, Aug. 4th, 1875.
J. A. HOWARD, *Ordinary.*

1190 GEORGIA, *Bartow County:*

Know all men by these presents that I, L. R. Ramsaur, of the county & State aforesaid, do hereby appoint Henry C. Ramsaur, of the county of Bartow & State aforesaid, my lawful attorney to sign my name as security on a bond to be given by John A. Erwin and F. P. Gray, administrators on the estate of Lewis Tumlin, late of Bartow county, dec'd, for six hundred thousand dollars for the purposes therein expressed in said bond; and my name so signed by my attorney as above shall be as binding on me as if I had personally signed the same.

L. R. RAMSAUR.

This 22d July, 1875.

A. J. HUTCHISON, *J. P.*

Recorded in book of bonds, pages 341 & 342, Aug. 4, 1875.
J. A. HOWARD, *Ordinary.*

1191 GEORGIA, *Gordon County:*

Know all men by these presents that I, Henry C. Erwin, of the county and State aforesaid, do hereby appoint Henry C. Ramsaur, of the county of Bartow & State aforesaid, my lawful attorney to sign my name as security on a bond to be given by J. A. Erwin and

F. P. Gray, administrators on the estate of Lewis Tumlin, late of Bartow county, dec'd, for six hundred thousand dollars for the purposes therein expressed in said bond; and my name so signed under this power of attorney shall be as binding on me as if I had personally signed the same.

H. C. ERWIN.

This July 22, 1875.

A. P. HUTCHISON, *J. P.*

Recorded in book of bonds, page 341, Aug. 4, 1875.
J. A. HOWARD, *Ordinary.*

1192 GEORGIA, *Gordon County:*

Know all men by these presents that I, John G. B. Erwin, of the county and State aforesaid, do hereby appoint Henry C. Ramsaur, of the county of Bartow and State aforesaid, my lawful attorney to sign my name as security on a bond to be given by J. A. Erwin & F. P. Gray, administrators on the estate of Lewis Tumlin, late of Bartow county, dec'd, for six hundred thousand dollars for the purposes therein expressed in said bond; and my name so signed under this power of attorney shall be as binding on me as if I had personally signed the same.

J. G. B. ERWIN.

This 22d July, 1875.

A. J. HUTCHISON, *J. P.*

Recorded in book of bonds, page 341, Aug. 4, 1875.
J. A. HOWARD, *Ordinary.*

1193 GEORGIA, *Bartow County:*

Know all men by these presents that I, James M. Veach, of said county & State, have authorized, constituted, and appointed Wm. T. Wofford, of said county and State, my lawful attorney-in-fact for me, and in my name do authorize and empower him to go before the ordinary of Bartow county and sign my name as security for Frank P. Gray & John A. Erwin on their bond required of them by law as administrators of Lewis Tumlin, dec'd; and, further, to do all things required and necessary to be done in and about the execution of these presents, hereby ratifying and confirming all that my said attorney may do in the premises.

In witness whereof I have hereto set my hand and seal this 31st of July, 1875.

J. M. VEACH. [L. S.]

Signed in presence of—
J. D. BOWDOIN,
N. P. & ex Of. J. P.

Recorded in book of bonds, page 345, Aug. 4, 1875.
J. A. HOWARD, *Ordinary.*

1194–1202 STATE OF GEORGIA, *Bartow County:*

I, J. A. Howard, ordinary in and for said county, do hereby certify that the foregoing eleven powers of attorney are full, true, and complete copies of the same as appear of file and record in the ordinary's office of said county.

Witness my hand and seal of office this May 29th, 1882.

[SEAL.] J. A. HOWARD, *Ordinary.*

* * * * * * *

1203 In the United States Circuit Court, Northern District of Georgia. In Equity.

JAMES L. RICE & WIFE *vs.* FRANK P. GRAY & Others.

To the judges of said court:

The petition of Cora M. Gray showeth she is one of the defendants to the original bill in said case; that in said bill it was set forth that she was one of the heirs-at-law of Lewis Tumlin, dec., and as such entitled to a distributive share in said estate, and it was further alleged that her husband, Frank P. Gray, administrator on the estate, had invested the funds of said estate in two mortgages in said bill described taken in the name of this defendant, your petitioner, on the Oothcaloga or Bartow Cotton Mills in Bartow county, Georgia.

At the time said bill was brought your petitioner was not informed of any waste of said estate by the administrators and believed there had been none, and was advised and believed that the only thing set forth in complainants' bill material for her to make answer to was the charge therein in relation to said mortgages.

1204 Your petitioner, therefore, filed her answer in said case denying the allegation of said bill in relation thereto and setting forth that her own separate estate was invested in said mortgage, but made no answer in regard to her distributive share in said estate or prayed any relief touching the same.

Your petitioner further shows that the special master appointed in said case, to whom the issues therein were referred, has filed his report sustaining her defense as touching said mortgages, and has further reported that said Frank P. Gray and certain other defendants named in said report are liable to said estate for the sum of forty-five thousand eight hundred and forty-six and $\frac{39}{100}$ dollars, including interest up to the 2nd day of August, 1884, and has further reported that your petitioner is a distributee of said estate of Lewis Tumlin and is indebted to said estate in the sum of fifteen hundred and twenty-four & $\frac{92}{100}$ dollars principal and for interest the sum of five hundred and ninety-three & $\frac{27}{100}$ dollars up to July 1, 1881, with legal interest on the principal sum from that date.

Your petitioner shows that she was not informed of the condition and state of her account with said estate or the liability, if any, of said Frank P. Gray and the other defendants thereto until the filing of the reports of said special master.

1205 And she therefore applied to solicitors to take steps to secure her rights, but by inadvertence they filed with the clerk her petition, in substance the same as this petition, without leave of the court first obtained, and she now asks that she may file this petition, *nunc pro tunc*, in lieu of the said petition so inadvertently filed.

Your petitioner, therefore, prays that she may be allowed to file this petition as an amendment to her original answer or otherwise and upon such terms as the court may direct, and that the final decree or other decree in said cause may fix fully her rights in said case, and that she may have a decree for her distributive share in said estate, and that she may also have such other and further relief in the cause as may be according to the principles of equity and her case may require, &c.

GRAHAM & GRAHAM,
Sol's for Cora M. Gray.

Note by Solicitors.

So much of the foregoing petition as is written on the margin ({) was not sworn to by Mrs. Gray, but was written there by solicitors afterwards—Jan. 12, 1885.

GRAHAM & GRAHAM,
Sol's for Mrs. Gray.

1206 STATE OF GEORGIA, *Fulton County:*

In person came before the undersigned, a commissioner of the United States circuit court for the northern district of Georgia, Cora M. Gray, who, on oath, says the facts set forth in the foregoing petition are true.

CORA M. GRAY.

Sworn to and subscribed before me this 7 day of January, 1885.
A. E. BUCK,
U. S. Comm'r & Clerk U. S. C. C't.

The foregoing petition having been this day submitted to me, at chambers, in the city of New Orleans, it is ordered that the same be filed and served on the parties in this cause or their counsel, and that they show cause, when the court is again in session, to wit, on Jan. 14, 1885, at 10 a. m., why the same should not be allowed as prayed and the relief sought granted.

January 13, 1885.

DON A. PARDEE, *Judge.*

Upon the hearing of the foregoing petition and motion it is ordered by the court that the same be allowed as an amend-
1207 ment to the original and former answer of the petitioner, Cora M. Gray, filed in this cause.

January 21, 1885.

ALECK BOARMAN,
U. S. Judge.

We acknowledge service of this petition and motion, and waive copy.
Jan'y 16, 1885.

A. P. WOFFORD,
Att'y for John S. Leake, Thos. W. Leake & N. M. Ford.
T. WARREN AKIN, *For Self.*
M. R. STANSEL,
Att'y for M. G. Dobbins.
W. K. MOORE,
Att'y for J. L. Rice and Wife and Other Heirs, Excepting Leake and Petitioner.
JOHN W. AKIN, *Att'y for Neal.*
GRAHAM & GRAHAM,
Sol'rs for Cora M. Gray.
F. P. GRAY.
J. W. GRAY,
P'r F. P. GRAY, *Att'y.*

Served Thomas W. Wilson, Esq., solicitor for James M. Veach, A. W. Trimble, R. L. Rogers, W. I. Benham, J. J. Howard, and A. W. Mitchell, personally with a copy of this petition and rule *nisi*, said Wilson being also solicitor for J. G. B. Erwin, H. C. Erwin, and H. C. Ramsaur, ad'n'r, &c.
This Jan. 17, 1885.

Filing.

Filed in clerk's office Jan. 19, 1885.

A. E BUCK, *Clerk.*

1208 In the United States Circuit Court, Northern District of Georgia. In Equity.

JAMES L. RICE & WIFE *vs.* FRANK P. GRAY *et al.*

To the judges of said court:

The petition of John S. Leake showeth that he is one of the defendants in said bill; that he was sued as such as one of the sureties on the administration bonds of Frank P. Gray as administrator on the estate of Lewis Tumlin, of which the complainants sought an account, and that it was also set forth in the said bill that the petitioner was one of the distributees of said estate by reason of having bought the share of one Lewis T. Erwin. Petitioner shows that at the time said suit was brought this defendant was advised and believed he was not liable as such surety in the manner and form set out in complainants' bill, and that he was also ignorant of the extent of the waste, if any, committed by the said Frank P. Gray, administrator. Petitioner, therefore, filed his answer jointly with other sureties sued as such, denying his liability as surety, and
1209 setting up his defence in that respect, but did not in and by said answer set up his claim to any distributive share in said estate or pray any relief touching the same. Your petitioner shows

the special master to whom said case was referred to take an account of said estate has filed his report, from which it appears that your petitioner, as assignee of said Lewis T., is entitled to a distributive share of one-seventh of said estate, after paying the debts thereof; and it further appears in and by the reports of said special master that said Frank P. Gray, as principal, and certain of the sureties on his administration bond in said report named are liable to said estate for waste of the assets thereof, including interest to the 2nd day of August, 1884, for the sum of forty-five thousand eight hundred and forty-six $\frac{39}{100}$ dollars. Your petitioner also shows that it further appears in and by said report that your petitioner is indebted to said estate in the sum of seven hundred and twenty-five $\frac{66}{100}$ dollars principal and the sum of one hundred and seventeen & $\frac{15}{100}$ dollars interest to July 1, 1881, with legal interest on the principal sum from that date; and it further appears by the report of said special master that said estate of Lewis Tumlin is indebted to N. B. Tumlin, George H. Tumlin, and your petitioner jointly
1210 in the sum of one thousand dollars principal and sixty-four & $\frac{17}{100}$ dollars interest to July 1st, 1881, with legal interest on the principal sum from that date, which sum was allowed to them by said report as against the other distributees of said estate, but not as against creditors.

Your petitioner further shows that he was prevented from setting up in his original answer any claim to his distributive share to said estate, because of his conflicting interest as an alleged surety on the administration bond of said Frank P. Gray, and because he believed that the waste of said estate committed by said Gray and his liability therefor was small as compared with the sum reported by the special master, and the contrary did not appear until said report came in.

Your petitioner, therefore, prays that he may be allowed to file this petition as an amendment to his original answer or otherwise amend said answer so as to set forth these facts upon such terms as the court may direct, and that the decree in said cause may when made fix and determine your petitioner's rights as distributee of said estate, and that he may have a decree for so much as may be found to be due him on that account, and that he may have
1211 such other relief in the cause as his case may require and as may be according to the principles of equity; & petitioner will ever pray, &c.

GRAHAM & GRAHAM,
Sol's for John S. Leake.

STATE OF GEORGIA, *Bartow County:*

In person came before the undersigned, a commissioner of the United States circuit court for the northern district of Georgia, John S. Leake, who, on oath, says the facts stated in the foregoing petition are true.

JOHN S. LEAKE.

taxed, and that the complainants do recover the same of the said Absalom P. Wofford, Thomas W. Leake, and Francis M. Ford.

And it is further ordered, adjudged, and decreed that the exceptions taken to the reports of said special master by the defendant, John Neal, be and they are hereby overruled and dismissed at his costs, to be taxed, and that the complainants do recover the same of the said John Neal.

And it is further ordered, adjudged, and decreed that all
1216 the reports of the special master made in this cause, including so much of the first report made and filed, dated Sept. 22, 1883, as has not been modified or changed by the subsequent reports of said special master, be, and they are hereby, approved and confirmed in all things.

And it is further ordered, adjudged, and decreed that the defendant, Frank P. Gray, is liable and indebted on his several administration bonds given by him as administrator on the estate of Lewis Tumlin, deceased, for arrears and balance on his administration account and for default and waste in the sum of forty-five thousand eight hundred and forty-six dollars and thirty-nine cents ($45,846.39), and the further sum of twelve hundred and seventy-six dollars and five cents ($1,276.05), for interest computed upon the sum first above named at the rate of six per centum per annum from the 2d day of August, 1884, to the 19 day of January, 1885, making the gross sum of forty-seven thousand one hundred and twenty-two dollars and forty-four cents ($47,122.44).

And it is further ordered, adjudged, and decreed that for a part of the gross sum aforesaid, to wit, the sum of eight thousand four hundred and fourteen dollars and fifty-six cents ($8,414.56), which includes interest computed to the 19th day of January, 1885, the said Frank P. Gray, as principal, and the defendants, John
1217 W. Gray, James M. Veach, Edwin M. Price, A. C. Trimble, Joel H. Dyer, William W. Rich, Nelson Gillreath, John J. Howard, Robert L. Rogers, William I. Benham, John S. Leake, and A. W. Mitchell, as sureties, are jointly and severally liable and indebted on the administration bond given by John A. Erwin and Frank P. Gray, as administrators on the estate of Lewis Tumlin, deceased, dated 2nd day of August, 1875.

And it is further ordered, adjudged, and decreed that for a part of the gross sum first aforesaid, to wit, the sum of fifteen thousand two hundred and eleven dollars and thirty-nine cents ($15,211.39), which includes interest computed to the 19th day of January, 1885, the said Frank P. Gray, as principal, and the said John W. Gray, James M. Veach, Edwin M. Price, A. C. Trimble, Joel H. Dyer, William W. Rich, Nelson Gilreath, John J. Howard, Robert L. Rogers, William I. Benham, John S. Leake, and A. W. Mitchell, as sureties, are jointly and severally liable and indebted on the administration bond given by John A. Erwin and Frank P. Gray, as administrators on the estate of Lewis Tumlin, deceased, dated August 2nd, 1875, and that for the same sum the said Frank P. Gray, as principal, and the said John W. Gray, Edwin M. Price, William W. Rich, Nelson Gilreath, John S. Leake, and the defendant, Thomas

W. Leake, as sureties, are also jointly and severally and
1218 concurrently liable and indebted on the administration bond given by the said Frank P. Gray, dated May 2nd, 1876, and that for the same sum the said Frank P. Gray, as principal, and the said John W. Gray, Nelson Gilreath, John S. Leake, and the defendants, Absalom P. Wofford and Francis M. Ford, as sureties, are also jointly, severally, and concurrently liable and indebted on the administration bond given by the said Frank P. Gray, dated October 13th, 1877, and that the several defendants last above named are also liable and indebted as last aforesaid, and for the same sum on the administration bond given by the said Frank P. Gray, dated May 6th, 1878.

And it is further ordered, adjudged, and decreed that for a part of the gross sum first aforesaid, to wit, the sum of four thousand nine hundred and eighty-eight dollars and forty-eight cents ($4,988.48), which includes interest computed to the 19th day of January, 1885, the said Frank P. Gray, as principal, and the said John W. Gray, James M. Veach, Edwin M. Price, A. C. Trimble, Joel H. Dyer, William W. Rich, Nelson Gilreath, John J. Howard, Robert L. Rogers, William I. Benham, John S. Leake, and A. W. Mitchell, as sureties, are jointly and severally liable and indebted on the administration bond given by John A. Erwin and Frank P. Gray, as admin-
1219 istrators on the estate of Lewis Tumlin, deceased, dated August 2nd, 1875, and that for this same sum the said Frank P. Gray, as principal, and the said John W. Gray, Nelson Gilreath, John S. Leake, Thomas W. Leake, Absalom P. Wofford, and Francis M. Ford, as sureties, are also jointly, severally, and concurrently liable and indebted on the administration bond given by said Frank P. Gray, dated October 13th, 1877, and that the several defendants last above named are also liable and indebted as last aforesaid, and for the same sum on the administration bond given by the said Frank P. Gray, dated May 6th, 1878.

And it is further ordered, adjudged, and decreed that for the balance of the gross sum first aforesaid, to wit, the sum of eighteen thousand five hundred and eight dollars and one cent ($18,508.01), which includes interest computed to the 19th day of January, 1885, the said Frank P. Gray, as principal, and the said John W. Gray, James M. Veach, Edwin M. Price, A. C. Trimble, Joel H. Dyer, William W. Rich, Nelson Gilreath, John J. Howard, Robert L. Rogers, William I. Benham, John S. Leake, and A. W. Mitchell, as sureties, are jointly and severally liable and indebted on the administration bond given by John A. Erwin and Frank P. Gray, as administrators on the estate of Lewis Tumlin, deceased, dated August 2nd,
1220 1875, and that the said Frank P. Gray, as principal, and the said John W. Gray, Nelson Gilreath, John S. Leake, Thomas W. Leake, Absalom P. Wofford, and Francis M. Ford, as sureties, are also jointly, severally, and concurrently liable and indebted for the same sum on the administration bond given by the said Frank P. Gray, dated May 6th, 1878.

And it is further ordered, adjudged, and decreed that the said Frank P. Gray, principal, and the said several defendants, sureties

as aforesaid, do pay into court within thirty (30) days from the entering of this decree the said several sums of money aforesaid for which they are respectively hereinbefore adjudged and decreed to be liable and indebted, and upon failure so to do that writs of *fieri facias* do issue in this cause for the said several sums of money against the defendants, respectively, who are herein and hereby adjudged and decreed to be liable for the same; and when said several sums of money or any part thereof shall be brought into court that the same shall be held for distribution amongst the creditors and heirs of the estate of Lewis Tumlin, deceased, under the order, direction, and decree of the court made or to be made in this case.

And it is further ordered, adjudged, and decreed that the defendants, Henry C. Erwin, John G. B. Erwin, and Henry C. Ram-
1221 saur, administrators on the estate of Lewis R. Ramsaur, deceased, are in nowise liable or indebted on the administration bond given by John A. Erwin and Frank P. Gray, as administrators on the estate of Lewis Tumlin, deceased, dated August 2nd, 1875, the said Henry C. Erwin, John G. B. Erwin, and the said Lewis R. Ramsaur, deceased, never having signed said bond or authorized any other person to do so for them.

And it is further ordered, adjudged, and decreed that the complainant, Ada S. Rice, and the defendants, Mary L. Spencer, Napoleon B. Tumlin, George H. Tumlin, Lula T. Lyon, Cora M. Gray, and John S. Leake, are each of them distributees of the estate of Lewis Tumlin, deceased, and that there are no others, and that they are entitled, in the final distribution thereof, to share alike; and that each of them have heretofore received by virtue of an order of the court of ordinary of Bartow county, Georgia, in property distributed in kind, the sum of twenty-four thousand dollars ($24,000), share and share alike, and in addition thereto have received of the administrator on said estate the sums hereinafter set forth in property and otherwise, for which they are liable to account with interest, as hereinafter stated, as between themselves and with creditors in
1222 case of a deficiency of assets, to wit:

The said Ada S. Rice must account for the sum of three hundred and seventy-three dollars and seventy-three cents ($373.73) principal, and the further sum of one hundred and forty-five dollars and thirty cents ($145.30) interest up to the 1st day of July, 1881, with legal interest on the principal sum from that date.

The said Mary L. Spencer must account for the sum of two thousand four hundred and sixty-seven dollars and fifty-three cents ($2,467.53) principal, and the further sum of one thousand six hundred and seventy dollars and seventy-six cents ($1,670.76) interest up to the 8th day of January, 1885, with legal interest on the principal sum from that date.

The said Lula T. Lyon must account for the sum of seven hundred and fifty-seven dollars and eighty-four cents ($757.84) principal, and the further sum of one hundred and ninety-three dollars and eighty-five cents ($193.85) interest up to the 1st day of July, 1881, with legal interest on the principal sum from that date.

The said George H. Tumlin must account for the sum of nine

hundred and two dollars and forty-three cents ($902.43) principal, and the further sum of two hundred and forty-seven dollars and eighty-seven cents ($247.87) interest up to the 1st day of July, 1881, with legal interest on the principal sum from that date.

1223 The said Cora M. Gray must account for the sum of fifteen hundred and twenty-four dollars and ninety-two cents ($1,524.92) principal, and the further sum of five hundred and ninety-three dollars and twenty-seven cents ($593.27) interest up to the first day of July, 1881, with legal interest on the principal sum from that date.

The said John S. Leake must account for the sum of seven hundred and twenty-five dollars and sixty-six cents ($725.66) principal, and the further sum of one hundred and seventeen dollars and fifteen cents ($117.15) interest up to the 1st day of July, 1881, with legal interest on the principal sum from that date.

And the said Napoleon B. Tumlin, having received nothing from said estate over and beyond said first distribution of property in kind, is not hereby required to account for anything.

And it is further ordered, adjudged, and decreed that the estate of Lewis Tumlin, deceased, is indebted to Mary L. Spencer in the sum of six hundred dollars, with legal interest thereon from the first day of January, 1879, for which the other distributees must account with her, and which is hereby allowed her as against them but not as against any creditors of said estate.

And it is further ordered, adjudged, and decreed that the

1224 estate of Lewis Tumlin, deceased, is indebted to Napoleon B. Tumlin, George H. Tumlin, and John S. Leake, jointly, in the sum of one thousand dollars principal debt and the further sum of sixty-four dollars and seventeen cents interest up to the first day of July, 1881, with legal interest on the principal sum from that date, for which the other distributees must account with them and which is hereby allowed them as against the other distributees, but not against any creditor of said estate.

And it is further ordered, adjudged, and decreed that the complainant, James L. Rice, by reason of his having on the 5th day of July, 1881, paid off and satisfied, for the benefit of the estate of Lewis Tumlin, deceased, a judgment and *fi. fa.* issued from the superior court of Bartow county, Georgia, in favor of Pique, Manier, Hall & Co. against B. G. Poole and Co., of which defendant firm Lewis Tumlin was in his lifetime a partner, and which judgment was founded on a note of B. G. Poole & Co., given in the lifetime of said Tumlin; that he, the said James L. Rice, be, and he is hereby, subrogated to all the right of the said Pique, Manier, Hall & Co. as to the sum so paid by him, to wit, the sum of fourteen hundred and thirty-five dollars and sixty cents ($1,435.60), with legal interest thereon from said 5th day of July, 1881, and that the same

1225 be paid to him according to its legal dignity and priority as established by law.

And it is further ordered, adjudged, and decreed that the *fi. fa.* issued from the superior court of Bartow county, Georgia, dated April 1st, 1879, upon a judgment rendered in said court on the 15th

day of January, 1878, founded on an obligation in writing given by Lewis Tumlin in his lifetime, said *fi. fa.* being in favor of Needam L. Angier, trustee, &c., against Frank P. Gray, administrator of Lewis Tumlin, deceased, and one R. C. Roberts, security on a supercedeas bond, and which judgment and *fi. fa.* were on the 21 day of June, 1879, transferred to the defendant, John Neal, is a valid and subsisting claim in the hands of said John Neal against the estate of Lewis Tumlin, deceased, for the sum of seven thousand and sixty dollars and forty-eight cents ($7,060.48) principal debt, and the further sum of seventeen hundred and sixty-seven dollars ($1,767.00) interest up to the 12th day of January, 1885, with legal interest on the principal sum from that date, and that said *fi. fa.* be paid according to its legal priority.

And it is further ordered, adjudged, and decreed that the estate of Lewis Tumlin is liable and indebted to the defendant, John Neal, on a judgment and *fi. fa.* issued from the superior court of Bartow county, Georgia, in favor of said John Neal against Thomas
1226 Tumlin, as principal, and Frank P. Gray, administrator of Lewis Tumlin, deceased, surety, and which judgment was founded on a note signed by Lewis Tumlin in his lifetime as surety for said Thomas Tumlin, according to its legal tenor and effect, and as surety only for the principal sum of thirteen hundred and ninety-eight dollars and seventy-seven cents ($1,398.77), with interest thereon at the rate of ten per centum per annum from the seventh day of June, 1881.

And it is further ordered, adjudged, and decreed that the defendants, John Neal and Thomas Warren Akin, do deliver up and turn over to James M. Neal, the receiver in this cause, within thirty (30) days from the entering of this decree, the note or notes and mortgages made by R. M. Young and P. M. B. Young to Frank P. Gray, as administrator of Lewis Tumlin, deceased, and also the note or notes and mortgages made by R. M. Young to P. M. B. Young, and by said P. M. B. Young transferred to said Gray as collateral security for the said notes payable to Gray as administrator, and that they also deliver up to the receiver in this cause the two notes on N. S. Eaves in their custody, each for the sum of three hundred and eighteen dollars and fifty-one cents, it being adjudged and decreed
by the court that no title or right therein or thereto passed
1227 by the attempt of the said Frank P. Gray to pledge them as collateral security to the said John Neal or the said Thomas Warren Akin for any debt claimed by them against the estate of Lewis Tumlin, deceased.

And it is further ordered, adjudged, and decreed that as to the matters and things set forth in complainants' bill against the said Frank P. Gray, as receiver of the assets of the firm of B. G. Poole & Co., appointed by the superior court of Bartow county, Georgia, this court declines to take jurisdiction, it being of opinion that said Frank P. Gray, as such receiver, is accountable only to the court by which he was appointed.

And it is further ordered, adjudged, and decreed that the allegations in complainants' bill that the two mortgages taken by Frank

P. Gray, in the name of his wife, Cora M. Gray, upon the Oothcaloga or Bartow Cotton Mills at Adairsville, Georgia, one of said mortgages being for the sum of thirteen thousand five hundred dollars and the other for the sum of twenty-one thousand three hundred dollars, were obtained by investing therein the funds of the estate of Lewis Tumlin, deceased, and not the funds of his said wife, Cora M. Gray, has not been sustained by proof, and so much of complainants' bill as relates to them is hereby dismissed.

1228 And it is further ordered, adjudged, and decreed that the following-named persons are creditors of said estate of Lewis Tumlin, deceased, and have now, or had at the time their claims were severally presented and passed upon by the special master, valid and subsisting claims against said estate, and are entitled to be paid out of the assets of said estate according to the priorities established by law, to wit:

D. W. K. Peacock, for services rendered the receiver as surveyor, one hundred and twenty-five dollars ($125.00).

D. P. Hill, for services rendered said estate as an attorney-at-law, two hundred and thirteen dollars and seventy-five cents ($213.75).

M. R. Akerman, executrix of Amos T. Akerman, deceased, for services of her testator as attorney-at-law rendered said estate, four hundred and fifty dollars ($450.00).

John W. Akin, for services rendered said estate by himself and Thomas Warren Akin as attorneys-at-law, two hundred and three dollars and eight cents ($203.08).

William K. Moore, for services rendered said estate as attorney-at-law, one hundred and fifty dollars ($150.00), with legal interest thereon from 28th day of July, 1881.

1229 Dabney and Fouche, for services rendered said estate as attorneys-at-law, one hundred and five dollars ($105.00) principal debt, six dollars and fifty-five cents ($6.55) interest to July 1, 1881, with legal interest on the principal sum from that date.

William T. Wofford, for services rendered said estate as attorney-at-law, three hundred and twenty-five dollars ($325.00) principal debt, eighty-four dollars and fifty-five cents ($84.55) interest to August 1st, 1881, with legal interest on the principal sum from that date.

J. J. Howard & Son, for services rendered said estate by Abda Johnson as attorney-at-law, six hundred and fifty-eight dollars and seventy-five cents ($658.75), with legal interest thereon from November 1st, 1881.

Thomas Stephens, for witness' fees attending Bartow superior court on a subpœna sued out for said estate by Gray, adm'r, twenty-three dollars and twenty-five cents ($23.25).

Joseph Willingham, on a cost *fi. fa.* from Gordon superior court against Gray, adm'r, &c., and E. E. Field, twenty-one dollars and fifty-seven cents ($21.57).

J. A. Howard, ordinary of Bartow county, for office fees incurred by Frank P. Gray, adm'r, &c., forty-three dollars ($43.00).

To W. H. Gilbert, A. P. Wofford, and L. D. Jolly, twenty dollars

($20.00) each for services as arbitrators in case between the
1230 estate of Lewis Tumlin, dec., and F. M. Martin & wife, being sixty dollars in all.

To Elizabeth Stokes, executrix, &c., on a judgment rendered in the lifetime of Lewis Tumlin, one hundred and fifty dollars ($150.00) principal, one hundred and thirty-eight dollars and ninety-one cents ($138.91) interest to July 1, 1881, with legal interest on the principal sum from that date.

To Joseph Willingham thirteen hundred and seventy dollars and ninety-two cents ($1,370.92), with legal interest thereon from December 28th, 1883, which is hereby decreed to be of the dignity of bonds and other obligations.

To W. C. Armstrong two hundred and twenty-nine dollars and eighty-four cents ($229.84) principal, two hundred and eighty-nine dollars and fifteen cents ($289.15) interest to 28th day of December, 1883, with legal interest on the principal sum from that date, and the further sum of ten dollars for costs, and this debt is hereby decreed to be of the dignity of bonds and other obligations.

To F. M. Martin and wife, Nancy Martin, on an award, the sum of four hundred and twenty dollars ($420.00).

To the Planters' and Miners' Bank, on a judgment founded on a note of J. D. Wilkinson, endorsed by Lewis Tumlin in his lifetime, two hundred and one dollars and seventy-five cents ($201.75) princi-
pal, one hundred and nine dollars and forty-six cents
1231 ($109.46) interest to November 2, 1884, with legal interest on the principal sum from that date, and the further sum of eleven dollars and twenty-five cents ($11.25) for costs.

And also to the said The Planters' and Miners' Bank the sum of twenty-six dollars and sixty cents ($26.60) principal, and twelve dollars and forty-five cents ($12.45) interest to July 1, 1881, with legal interest on the principal sum from that date, the same being on a judgment founded on a note given by B. G. Poole & Co., of which firm Lewis Tumlin was a partner to John Eaves.

To Miles G. Dobbins, on two judgments, also founded on notes of B. G. Poole & Co., thirteen hundred and thirty-three dollars and thirty-eight cents ($1,333.38) principal, eight hundred and sixty-eight dollars and fifty-two cents ($868.52) interest to September 24th, 1884, with legal interest on the principal sum from that date.

To Margaret McMurray, executrix of Madison McMurray, dec., on a note signed by Lewis Tumlin in his lifetime, five hundred and forty-seven dollars and thirty-one cents ($547.31) principal, six hundred and seventeen dollars and seventy-two cents ($617.72) interest to Nov. 2nd, 1884, with legal interest on the principal sum from that date.

To T. M. Ansley, executor, &c., on a note given by Lewis
1232 Tumlin in his lifetime, five hundred and thirty dollars ($530.00), with legal interest thereon from June 17th, 1884.

To J. H. Rogers & Co. seventy-five dollars ($75.00) on an open account made with them by Lewis Tumlin in his lifetime.

And it is further ordered, adjudged, and decreed that in all cases where claims against the estate of Lewis Tumlin, deceased, have

been presented to the special master and proven before and allowed by him the creditor allowed such claim shall also recover of said estate the costs of such hearing, to be taxed against said estate and paid out of the assets thereof.

And it is further ordered, adjudged, and decreed that in all cases where claims against the estate of Lewis Tumlin have been presented to the special master and disallowed and rejected by him that the complainants in this case recover of the creditor or claimant whose claim is so rejected and disallowed the costs of the hearing of his claim before the special master to be taxed against him.

And it is further ordered, adjudged, and decreed that the costs of the hearing before the special master of the special defenses made by the several defendants as sureties sole-y on the administration bonds of the defendant, Frank P. Gray, be taxed against the said defendants, respectively, in accordance with the reports and
1223 recommendation of the special master, reference to said reports being had for that purpose, and that the complainants do recover the same of the said defendants accordingly.

And it is further ordered, adjudged, and decreed that all the costs in this cause not hereinbefore otherwise provided for by this decree be taxed against the defendant, Frank P. Gray, including the compensation of the master and the costs of the hearing before him, and that the complainants do recover the same of the said Frank P. Gray in the first instance, and, failing in this, of the several defendants, his sureties on his administration bonds, who are held liable in the second instance, but for these costs they are adjudged and decreed to be liable and indebted as sureties jointly and not severally—that is to say, that each of the said several defendants, to wit, John W. Gray, James M. Veach, Edwin M. Price, Joel H. Dyer, A. C. Trimble, William W. Rich, Nelson Gilreath, William I. Benham, Robert L. Rogers, John J. Howard, John S. Leake, A. W. Mitchell, Thomas W. Leake, Absalom P. Wofford, and Francis M. Ford, are liable as surety for the said Frank P. Gray for his aliquot share of said costs, but not otherwise or for the aliquot share of any other of said sureties.

And it is further ordered, adjudged, and decreed that the
1234 injunction heretofore granted in this cause restraining and enjoining the defendant, Frank P. Gray, as administrator of the estate of Lewis Tumlin, deceased, from in any way interfering or intermed-ling with the assets and affairs of the estate of Lewis Tumlin, deceased, be made perpetual, and that the receiver heretofore appointed in this cause be continued until he shall collect in all the assets of said estate, and distribute the same under direction of the court, and settle his accounts.

And it is further ordered that the bill be retained for the further direction of the court as to the distribution of the assets of the estate of the said Lewis Tumlin, deceased, amongst the heirs and creditors of said estate, and to the end that this may be done the special master is directed to file his report upon all such matters and things as have been referred to him by the first day of the next term of the court.

Decree rendered this 22 day of January, 1885.

DON A. PARDEE, *Judge.*
ALECK BOARMAN,
U. S. Judge.

Atlanta, Ga., Jan'y 22, A. D. 1885.

Filing.

Filed in clerk's office, Jan. 22, 1885.

A. E. BUCK, *Clerk.*

1235 Circuit Court of the United States for the Northern District of Georgia. In Equity.

JAMES L. RICE & ADA S. RICE, His Wife,

vs.

FRANK P. GRAY, Adm'r L. Tumlin, Deceased, *et al.*

To Frank P. Gray, of the county of Fulton, in the northern district of Georgia; John W. Gray, Edwin M. Price, Wm. W. Rich, Nelson Gilreath, John S. Leake, Thomas W. Leake, and Francis M. Ford, of the county of Bartow, in the northern district of Georgia, and Absalom P. Wofford, of the county of Banks, in the northern district of Georgia, and Joel H. Dyer, of the county of Polk, in the northern district of Georgia:

We, James M. Veach, Robert L. Rogers, A. C. Tumlin, W. I. Benham, and John J. Howard, of the county of Bartow, in the northern district of Georgia, and A. W. Mitchell, of the county of Fulton, in said northern district of Georgia, hereby notify you that in the matter of the decree in favor of the complainants above stated against you and ourselves, signed by the court, in the sum of forty-five thousand eight hundred and forty-six dollars and thirty-nine cents or other like sum, with interest thereon, as provided in said decree, that we will,
1236 during the session of said circuit court now being held, petition said court for an appeal from said decree to the Supreme Court of the United States, and we shall likewise execute and tender to said court a bond as required by law, and pray the court for the allowance of our appeal, the approval of our bond, and for an order of supersedeas as to us, and prosecute said appeal.

JAMES M. VEACH,
A. C. TRIMBLE,
W. I. BENHAM,
R. L. ROGERS,
J. J. HOWARD,
A. W. MITCHELL,
By their sol'rs, WYNATT & HOWELL,
THOMAS W. MILNER.

We, the undersigned, do hereby acknowledge due service of the within original notice, and also hereby waive copy of same and all other and further service.

This 27 day of January, 1885.

A. P. WOFFORD.
THOMAS W. LEAKE.
JOHN S. LEAKE.
JOHN W. GRAY.
EDWIN M. PRICE.
JOEL H. DYER.
W. W. RICH.
FRANK P. GRAY.

1237 STATE OF GEORGIA, *Bartow County:*

Before me, Aaron Collins, United States commissioner in the northern district of Georgia, personally came Albert S. Johnson, who on oath says that he has this day served Nelson Gilreath in person with a true copy of the annexed and within original notice.

This Jan'y 26th, 1885.

ALBERT S. JOHNSON.

Sworn to and subscribed before me January 26, 1885.

AARON COLLINS,
U. S. C. C. Comm'r.

STATE OF GEORGIA, *Bartow County:*

Before me, Aaron Collins, United States commissioner in the northern district of Georgia, personally came Albert S. Johnson, who on oath says that he has this day served Francis M. Ford with a true copy of the annexed and within original notice by leaving said copy at his most notorious place of abode.

This January 26th, 1885.

ALBERT S. JOHNSON.

Sworn to and subscribed before me January 26, 1885.

AARON COLLINS,
U. S. C. C. Comm'r.

STATE OF GEORGIA, *Fulton County:*

Before me, A. E. Buck, clerk of the district and circuit courts for the northern district of Georgia, personally appeared Thomas W. Milner, Esq., who, after being duly sworn, says that he is acquainted with Francis M. Ford, who resides in the county of Bartow, State of Georgia; that he — at this time, and was on the 26th day of
1238 the present month, absent from his home; absent from the State and county aforesaid; and affiant is informed and believes that he is and was on the day mentioned beyond the jurisdiction of the State and somewhere in the State of Mississippi.

THOMAS W. MILNER.

Sworn to and subscribed before me this Jan'y 28, 1885.

A. E. BUCK,
Clerk and U. S. Comm'r

In U. S. Circuit Court for Northern District of Georgia. In Equity.

JAMES L. RICE & WIFE *vs.* FRANK P. GRAY *et al.*

Let the foregoing notice of petition for appeal and the service and acknowledgments of service be entered of record in this cause.
In open court Jan. 28th, 1885.

ALECK BOARMAN,
U. S. Judge.

Filing.

Filed in office January 28, 1885.

R. E. BOYD, *Dep'ty C'k.*

1239 *Application for Appeal to Supreme Court.*

In Circuit Court of United States, Northern Dist. Georgia.

JAS. L. RICE and Others *vs.* F. P. GRAY and Others.

Bill, etc.

Order referring to E. N. Broyles, special master, to hear and report as to amount of appeal, bond, and sufficiency of sureties.

The question of the amount of the bond to be given on appeal in said case and the sufficiency of the security to be offered is hereby referred to E. N. Broyles, special master in said case, and he is empowered to hear the parties and evidence on said points summarily and to report his finding thereon to this court as soon as possible.
Jan'y 26th, 1885.

ALECK BOARMAN,
U. S. Judge.

Filing.

Filed in office January 28, 1884.

R. E. BOYD,
Dep'ty Clerk.

1240 *Report of E. N. Broyles, Special Master, as to Bond and Surety on Appeal.*

Circuit — U. S.

JAMES L. RICE and Others *vs.* F. P. GRAY, Adm'r, and Others.

Bill, etc.

In the matter of appeal bond in carrying said case to Supreme Court U. S.

The undersigned, as special master appointed to hear evidence and report to said court as to the amount in which the bond should be given and as to the sufficiency of the sureties tendered, reports as follows:
In view of the amount of the decree against the appealants, their share of liability for the same being about forty thousand dollars,

the *the* interest thereon for some three years, such time being perhaps necessary for final decision in the Supreme Court, the possibility of ten per cent. as damages being awarded in the Supreme Court against appealants, and some three or four thousand dollars of costs and expenses being likely to be charged and taxed against appealants, I think the bond should be in the penal sum of sixty thousand dollars.

1241 Appellants tender as sureties on their bond James R. Wylie and James Henry Porter, both citizens of Georgia and residents in the city of Atlanta, Ga. From an inspection of the tax-books, both State and county and city, I find that Mr. Wylie owns real estate in Atlanta and Fulton county, Georgia, of the value of thirty-six thousand four hundred and fifty dollars, and from his own statements that over and above all debts and liabilities his property is worth more than fifty thousand dollars.

From the same source I find that Mr. Porter owns land and real estate in said county of Fulton and in city of Atlanta to the value of fifty-five thousand dollars. From Mr. Porter's own statements and the statements of others I find that, over and above all debts and liabilities and exemptions, his property is worth much more than the whole amount of the bond; in fact, that Mr. Porter is — wealt-y man—worth some $200,000 to $300,000.

I find further that both said offered sureties are men of high character as reliable business men and safe, very safe, in all financial respects, and I therefore find that they are good and sufficient

1242 surety to go on the said appeal bond.

Jan'y 27, 1885.

E. N. BROYLES,
Special Master.

Filing.

Filed in office Jan'y 28, 1885.

R. E. BOYD,
Deputy Clerk.

1243 In the Circuit Court of the United States for the Northern District of Georgia. In Equity.

JAMES L. RICE & WIFE *vs.* FRANK P. GRAY, Adm'r, *et al.*

Know all men by these presents that we, James M. Veach, John J. Howard, William I. Benham, A. C. Trimble, R. L. Rogers, A. W. Mitchell, as principals, and James R. Wylie and James H. Foster, as sureties, are held and firmly bound unto Ada S. Rice, Mary L. Spencer, Napoleon B. Tumlin, George H. Tumlin, Lula T. Lyon, Cora M. Gray, John S. Leake, as distributees of the estate of Lewis Tumlin, deceased; and James L. Rice, John Neal, D. W. K. Peacock, D. P. Hill; M. R. Akerman, ex't'x of Amos T. Akerman; John W. Akin, T. W. Akin, W. K. Moore, Dabney & Fouchie, William T. Wofford, J. J. Howard & Son, Thomas Stephens, Joseph Willingham, J. A. Howard, W. H. Gilbert, H. P. Wofford, L. D. Jolly, Elizabeth Stokes, W. C. Armstrong, F. M. Martin, Nancy Martin, Planters' and Miners'

Bank, Miles G. Dobbins; Margaret McMurray, ex'tr-x of Madison McMurray; T. M. Ansley, ex't-r, &c.; J. H. Rogers & Co., as creditors of the estate of Lewis Tumlin, deceased, in the full sum of sixty thousand dollars, to be paid to the persons last aforesaid mentioned as distributees and creditors of the estate of Lewis Tumlin, deceased, their attorneys, executors, administrators, or assigns; to which payment, to be well and truly made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

1244 Sealed with our seals and dated this 28th day of January (1885), eighteen hundred and eighty-five.

Whereas lately at a session of the circuit court for the northern district of Georgia, in the United States of America, in a suit depending in said court between James L. Rice & wife, complainants, and Frank P. Gray, administrator, *et al.*, defendants, a final decree was rendered against the said James M. Veach, J. J. Howard, W. I. Benham, A. W. Mitchell, A. C. Trimble, and R. L. Rogers and other defendants not makers of this bond, and the said James M. Veach, J. J. Howard, W. I. Benham, A. W. Mitchell, A. C. Trimble, and R. L. Rogers, having obtained the allowance of an appeal and filed a copy thereof in the clerk's office of said court to reverse the said decree in the aforesaid suit, all of which was done in open court during the term of said court at which said decree was rendered—the same having been done in open court and during the term of said court at which said decree was rendered, no citation was directed to said distributees and creditors of the estate of Lewis Tumlin, deceased—citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of this obligation is such that if the said James M. Veach, J. J. Howard, W. I. Benham, R. L. Rogers, *W. I. Benham,* A. C. Trimble, and A. W. Mitchell shall prosecute said ap-

1245 peal to effect, and answer all damages and costs if they fail to make their appeal good, then the above obligation to be void; else to remain of full force and virtue.

Sealed and delivered in the presence of—

J. M. VEACH. [SEAL.]
J. J. HOWARD. [SEAL.]
W. I. BENHAM. [SEAL.]
R. L. ROGERS. [SEAL.]
A. C. TRIMBLE, [SEAL.]
By J. M. VEACH, *Attorney-in-Fact.*
A. W. MITCHELL. [SEAL.]
JAMES R. WYLIE, *Security.* [SEAL.]
J. H. PORTER, *Security.* [SEAL.]

Approved by the court January 28th, A. D. 1885.

ALECK BOARMAN,
U. S Judge.

GEORGIA, *Bartow County:*

Know all men by these presents that I, Augustus C. Trimble, do make, constitute, and appoint, and by this instrument have made, constituted, and appointed, James M. Veach, of said county and State, my true and lawful attorney, for me and in my stead to make, execute, and sign my name to any bond which may be deemed necessary in the matter of the appeal in the case of Rice and wife *versus* F. P. Gray, administrator of the estate of Lewis Tumlin, from the circuit or district court of the United States for the northern district of Georgia to the Supreme Court of the said United States,

1246 hereby ratifying the act of the said James M. Veach by virtue of this my power of attorney, as fully and completely as if I were present and in my person signing and executing and making said appeal bond.

In witness whereof I hereunto set my hand and affixed my seal this the (27th) twenty-seventh day of January, A. D. eighteen hundred and eighty-five.

A. C. TRIMBLE. [L. S.]

Signed and sealed in the presence of the undersigned, a justice of the peace, the day and year above given.

B. F. BIBB, *J. P.*,
J. P. 856, Dist. Ga., Mil.

GEORGIA, *Bartow County:*

This is to certify that B. F. Bibb, who attests the signature of A. C. Trimble to the foregoing power of attorney, is a justice of the peace, regularly appointed and qualified to administer oaths and attest and execute legal papers under the provisions of the laws of the State of Georgia.

Witness my seal of office and official signature.

F. M. DURHAM,
Clerk Superior Court, Bartow County.

Filing.

Filed in office January 28th, 1885.

R. E. BOYD,
Deputy Clerk.

1247 In the United States Circuit Court for the Northern District of Georgia. In Equity.

JAMES L. RICE and WIFE *vs.* FRANK P. GRAY, Adm'r, *et al.*

To the honorable the judges of the circuit court in said circuit:

The petition of James M. Veach, A. C. Trimble, John J. Howard, Robert L. Rogers, William I. Benham, and A. W. Mitchell respectfully shows that during the present term of this court, to wit, on the 22 day of January, A. D. 1885, a final decree was rendered in the above-stated cause, whereby it was adjudged that Frank P. Gray was liable and indebted on the several administrator's bonds given by him as administrator on the estate of Lewis Tumlin, deceased,

for arrears and balance on his administrator's account and for default and waste, in the sum of forty-five thousand eight hundred and forty-six dollars and thirty-nine cents (45,846.39), and the further sum of twelve hundred and seventy-six dollars and five cents (1,276.05), interest to the 19th day of January, 1885, making in gross the sum of forty-seven thousand one hundred and twenty-two dollars and forty-four cents ($47,122.44); and whereby it was also adjudged that your petitioners, with their co-sureties, John W. Gray, Edwin M. Price, Joel H. Dyer, William W. Rich,
1248 Nelson Gilreath, and John S. Leake, on the joint bond of John A. Erwin and Frank P. Gray, as administrators on the estate of Lewis Tumlin, deceased (said bond dated 2nd day of August, 1875), were jointly and severally — with the said Frank P. Gray, as principal, for a part of the gross sum aforesaid, to wit, the sum of eight thousand four hundred and fourteen dollars and fifty-six cents ($8,414.56); and whereby it was also further adjudged that your petitioners, with their co-sureties upon said joint bond of John A. Erwin and Frank P. Gray, were jointly and severally bound with the said Frank P. Gray, as principal, and his sureties mentioned in said decree, on three other administration bonds made by said Frank P. Gray as sole administrator of the estate of Lewis Tumlin, deceased, one dated May 2nd, 1876, one dated October 13th, 1877, and one dated May 6, 1878, for the balance of said gross sum of forty-seven thousand one hundred and twenty-two dollars and forty-four cents ($47,122.44), in sums apportioned among the obligors on said bonds according to dates of liability or indebtedness of said Gray as principal; and whereby also it was adjudged, ordered, and decreed that all of the exceptions of your petitioners to the report of the special master, E. N. Broyles, were overruled and dismissed. Your petitioners claim that it was error to overrule said exceptions or any or either of them; that it is error to charge your petitioners with any default, indebtedness,
1249 or waste of F. P. Gray, as administrator of Lewis Tumlin, deceased, after the resignation of his co-administrator, John A. Erwin; that it was error to disallow to the administrators, Erwin and Gray, the commissions allowed them by the ordinary of Bartow county for distribution of the estate in kind of said Lewis Tumlin, deceased; that it was error to hold and adjudge that the release of H. C. Erwin, J. G. B. Erwin, and R. L. Ramsour, now deceased, as sureties on the bond of F. P. Gray and John A. Erwin, joint administrators as aforesaid, did not discharge the sureties on said bond; that it was error to allow the amended answers of Cora M. Gray and John S. Leake asserting their claims against Frank P. Gray after the hearing and trial of the cause; also to allow an order that the cause abate as to William T. Wofford after the trial of the cause, he having died long anterior to said trial.

Petitioners claim that there are other errors incidentally and collaterally connected with the overruling of petitioners' exceptions to the special master's reports, but which it is not necessary to mention here specifically, as the record discloses them. Wherefore your petitioners pray the allowance of an appeal from said decree of said

court to the Supreme Court of the United States. Petitioners have, in writing, notified all their co-sureties on the joint bond of Frank P. Gray and John A. Erwin, as administrators, &c., of their pur-
1250 pose to apply for this appeal. They have also notified, in writing, all the defendants against whom said decree is pronounced of said purpose to apply for said appeal to the end that they might join in said appeal if they so desired. Petitioners alone of the sureties on the joint bond of Frank P. Gray and John A. Erwin, administrators as aforesaid, have made and filed exceptions to the reports of the special master, and they only, of all the defendants, were interested in the matter of said exceptions or could properly make said exceptions, and they therefore pray to be allowed to execute a bond for appeal, with their sureties separate from any other defendants who may desire to appeal, should any so desire.

January 28th, 1885.

JAMES M. VEACH,
JOHN J. HOWARD,
WILLIAM I. BENHAM,
ROBERT L. ROGERS,
A. C. TRIMBLE,
A. W. MITCHELL,
By their attorney P. L. MYNATT.

The appeal prayed for in the foregoing petition is hereby allowed, and petitioners alone of the sureties on the joint bond of Frank P. Gray and John A. Erwin, as administrators on the estate of
1251 Lewis Tumlin, deceased, having excepted to the reports of the special master upon the grounds taken by them, and they alone of the defendants being interested in the questions made by their exceptions, and it appearing to the court that the petitioners have in writing notified all defendants in the decree pronounced of their purpose to appeal, it is ordered that the petitioners be allowed their appeal upon executing a bond in the penal sum of sixty thousand dollars, which said bond is now filed and approved by the court in open court during the regular term thereof, at which said decree was signed and entered of record, which said appeal and bond will operate as a supersedeas in this cause as to said petitioners. It is further ordered that the evidence in writing of the notice of service upon defendants by petitioners for appeal of their purpose to appeal be entered of record in this cause as the same now appears exhibited to this court.

In open court January 28th, 1885.

ALECK BOARMAN,
U. S. Judge.

Filing.

Filed in office January 28th, 1885.

R. E. BOYD,
Deputy Clerk.

1252 UNITED STATES OF AMERICA,
Northern District of Georgia:

I, Alfred E. Buck, clerk of the United States circuit court in and for the northern district of Georgia, do hereby certify the foregoing to be a true, full, correct, and complete transcript of the record and proceedings had in the cause wherein John L. Rice *et al.* were complainants and Frank P. Gray *et al.* were respondents in all matters concerning the questions involved in the appeal of James M. Veach, N. C. Trimble, W. I. Benham, R. L. Rogers, J. J. Howard, and A. W. Mitchell as appears of record and now remaining of file in my office.

In testimony whereof I hereunto set my hand and seal of the said circuit court, at Atlanta, Ga., this the 25th day of September, A. D. 1885.

[Seal U. S. Circuit Court, N. D. Georgia.]

A. E. BUCK, *Clerk.*

1253 *Statement of Errors and of Parts of the Record to be Printed by Appellants.*

In the United States Supreme Court.

J. M. VEACH *et al.*, Appellants,

vs.

JAMES L. RICE & WIFE *et al.*, Appellees.

Appellants will insist that the court below erred in overruling their exceptions to the report and amended report of the master as follows, to wit:

Exception 1st. For that the said master has by his said report certified that he was of the opinion that the discharge of John A. Erwin, as co-administrator, did not discharge him as surety for his co-administrator, Frank P. Gray, and for that he has further certified that he is of the opinion that the order of the ordinary of Bartow county, made on the — day of May, 1876, discharging the sureties of Erwin and Gray on their bond as administrators of Lewis Tumlin, deceased, was a nullity and did not, in fact, release said sureties.

Exception 2nd. For that the said master hath in and by his said report certified that he is of the opinion that the order which was passed by the ordinary of Bartow county, bearing date on the — day of May, 1876, which order allowed said John A. Erwin's resignation as one of the administrators on said estate of Lewis Tumlin, deceased, and discharged him from his trust as administrator and relieve his sureties from all further liability, was not effectual as a discharge of the sureties on the bond given by
1254 said Gray and Erwin jointly, because the said sureties had presented no petition to said court of ordinary praying for discharge from said trust, and on this point further certifying that he was of the opinion that the discharge of Erwin by the order of

the court of ordinary did not in legal effect discharge the sureties on the bond of said Erwin and Gray as joint administrators, but that they remained bound thereon as the sureties of said Gray as sole administrator, whereas, in fact and as a question of law, the said special master should have found, as to the two foregoing exceptions, 1st, that the discharge of Jno. A. Erwin as co-administrator upon his resignation discharged him as surety for his co-administrator, and, 2nd, that the legal effect of his said discharge was to discharge all the sureties on said joint bond given by said John A. Erwin and F. P. Gray as administrators on said estate of Lewis Tumlin, deceased, without any petition or application on their part to said court of ordinary, or by any one else for them.

Exception 3rd. For that the said master hath in and by his report certified that at the May term, 1876, of the court of ordinary in and for the county of Bartow said court of ordinary granted the petition of John A. Erwin to resign his administratorship and by the same order appointed Frank P. Gray sole administrator and required him to give a new bond and security as such, and further ordered that the said John A. Erwin, after settlement with said Frank P. Gray as his successor, together with his securities, be discharged from all liability for any mismanagement of said estate in the future, but not for any past liability of said John A. Erwin as administrator, and has also certified that the order of said ordinary permitting the said John A. Erwin to resign and appointing said Frank P.
1255 Gray sole administrator was appealed from and the case carried to the superior court of Bartow county, and there, on August 4th, 1876, affirmed by a verdict of a jury, and, notwithstanding these recitals by the said special master, he has not found and certified that the said John A. Erwin as administrator, together with his sureties, *were* discharged, whereas he should have certified that the court of ordinary of Bartow county was a court of original, general, and exclusive jurisdiction of all matters pertaining to the administration of estates, and that its orders on this subject were conclusive until reversed by appeal or other legal method, and should also have found that, in accordance with the terms of said order so granted by said court of ordinary, said John A. Erwin was discharged from his trust as administrator on said estate, as well as discharged as surety of his co-administrator, F. P. Gray, together with all the sureties on said bond.

Exception 4th. For that the said special master hath in and by his said report gone beyond the allegations and charges of the complainants' bill of complaint in this cause to consider and report upon the liability of John A. Erwin and the sureties on the bond made by him and F. P. Gray as joint administrators on said estate of Lewis Tumlin, deceased, whereas he should have confined himself to the allegations and charges of said bill by said complainants which did not intimate any liability against the said John A. Erwin or the sureties on the bond which the said Erwin signed as administrator, but, on the contrary, treats the resignation of said John A. Erwin and the discharge of him and his sureties by the ordinary of Bartow county as the end of their liability. These defendants refer

to the original bill of complaint filed by the complainants in this cause, which constituted the pleadings on the part of the
1256 compl'nts at the time of the reference of said cause to said special master.

Exception 5th. For that the said special master hath in and by his said report reduced the commission and fees allowed the administrators, John A. Erwin and F. P. Gray, for the division of land among the heirs, which was three per cent. on the value of the land so distributed, and which commission and fees amounted to $3,433.68, to the sum of $500.00, holding that the order of the ordinary of Bartow county making this allowance to said administrators was not conclusive and that said allowance was not sustained by the evidence submitted to him, whereas said special master should have held that said order making said allowance was conclusive on the parties interested, and that the evidence sustained said allowance as reasonable and not excessive.

Exceptions to Second Report of Special Master.

Exception 1st. For that the said master hath in and by his second general report certified that Frank P. Gray and John A. Erwin, administrators, did not make and file with the court of ordinary of Bartow county, Georgia, their first return in the manner required by law, in this, that they failed to account for all receipts and expenditures by them as administrators in said return, and that said master, by his said report, hath held that on account of such neglect on the part of said administrators *that* there should be allowed to them no commissions, and that all the commissions heretofore allowed them in his former report be forfeited and disallowed, whereas said special master should have held and reported that said Frank P. Gray and John A. Erwin, administrators, were
1257 entitled to the commissions claimed by them in their said first return and should have allowed them credit on the account stated by him in his said report for all of the commissions so claimed by them. The evidence submitted to said special master and reported by him does not require a forfeiture of such commissions; neither does the statute require such forfeiture.

Exception 2nd. For that the said special master hath erred in his said report in holding and reporting that the discharge of J. G. B. Erwin and H. C. Erwin and L. S. Ramsaur, because their names had been improperly signed to the joint bond of Gray and Erwin, administrators, by their attorney-in-fact, did not discharge their co-sureties on said bond, whereas the evidence submitted to and reported by the said master hereinafter referred to shows that the court of ordinary, in having said joint bond executed in his presence as required by law, knew that the attorney-in-fact of the sureties above mentioned had no authority to sign such bond, and, in taking their signatures to such bond, the co-sureties were misled and their liability increased above that which appeared in the face of the bond, and said master should — held that they were thereby discharged.

Exception 3rd. For that the said master, in his supplemental report, endorsed "overruling exceptions," hath transcended the powers

of a master in chancery in undertaking to overrule exceptions to his original report and in undertaking to pass upon and decide questions of law; also holding in his said supplemental report that the judgment of the superior court of the county of Bartow, *nunc pro tunc*, upon the verdict rendered upon the appeal from the court of ordinary of said county, on the petition of John A. Erwin
1258 for leave to resign as one of the administrators of Lewis Tumlin, deceased, did not present an adjudication of all matters pertaining to the resignation of said Erwin and the sureties upon his bond as administrator, which adjudication is final and conclusive of the question of the resignation of said Erwin and his discharge and the discharge of all the sureties on the administration bond executed by said Erwin and Gray, and said special master erred in not so holding.

The court below erred in overruling the foregoing exceptions or any or either of them. It was error to charge your petitioners with any default, indebtedness, or waste of F. P. Gray, as administrator of Lewis Tumlin, deceased, after the resignation of his co-administrator, John A. Erwin. It was error to disallow the administrators, Erwin and Gray, the commissions allowed them by the ordinary of Bartow county for distribution of the estate in kind of said Lewis Tumlin, deceased. It was error to hold and adjudge that the release of J. G. B. Erwin and H. C. Erwin and L. S. Ramsaur, as sureties on the bond of F. P. Gray and John A. Erwin, joint administrators as aforesaid, did not discharge the sureties on said bond. It was error to allow the amended answer of Cora M. Gray and John S. Leak asserting their claim against Frank P. Gray after the hearing and trial of the cause; also to allow and order that the cause abate as to William P. Wofford after the trial of the cause, he having died long anterior to said trial.

Appellants will also insist that the circuit court for the northern district of Georgia had no jurisdiction to render judgment or pronounce a decree in favor of those of the defendants who are and were citizens of the State of Georgia, when said suit was begun and have been ever since, against appellants, who are and were also citizens of the State of Georgia, all of which appears in the record, and
1259 that the judgment and decree in their favor is void for want of jurisdiction.

And the appellants desire the printing of the following parts of the record, which they think are all that is necessary for the consideration of the foregoing alleged errors, to wit: So much of the original record now on file in the office of the clerk of the Supreme Court of the United States as is indicated by the pages of the index thereto attached as follows: All from page one to 94, both inclusive, the order overruling the demurrer at page 108, and the order of reference to the special master on page 109; the amendment to the bill, page 120, and all following that down to and including the beginning of the first report of the special master, page 148. Print down to item 42, on page 175, and omit all the balance except items 56, 57, 58, 63, 64, 79, and 88, on page 220, and the formal conclusion on page 230, beginning "This ends the report," &c., signed by the

master. Then print all of the exceptions to master's report by the defendants, Benham, Rogers, Trimble, Veach, Howard, A. C. & J. G. B. Erwin, and H. C. Ramsaur, beginning at page 231, and print the exceptions to the master No. 5, at page 240, pertaining to the holding of the master that Erwin had no right to resign, and also the 13th exception, at page 254, as to Gray's making illegal contracts with Stansel and Wofford for division of fees, and also exception 14, at page 255, paying C. B. Welbourn — not due and charged as wasteful and not in good faith. Omit all other parts of the exceptions which begin at page 236 and end at page 287. Print page 288, and all down to and including the report of the special master on the liability of sureties on the first bond of Gray and Erwin, which last report begins on page 342. Then print all down to and including the amended answer and petition of Cora M. Gray, beginning at page
373. Print Exhibit A to master's report, beginning at page
1260 813, and Exhibit B, beginning at page 816. Print Exhibit L, at page 1048, Exhibit N, at page 1049, and Exhibit M, at page 1058. Print the caption of Exhibit O, at page 1060. Omit all the items in that exhibit, and print the balance of page 1069, being Gray's receipt and ordinary's certificate. Print Exhibits P, Q, R, S, T, U, V, W, X, and Y, being all of the exhibits from page 1070 to 1095, inclusive. Print oral testimony of Benham, Rogers, *et al.* as to validity of bond, beginning at page 1120; also the interrogatories and depositions of J. A. Erwin, beginning at page 1129, and all of the record down to and including the power of attorney to sign bond, which last begins at page 1183. Then print petition of Cora M. Gray, beginning at page 1203, and all the balance of the record, including petition and order on appeal, beginning at page 1247 and going to the end of the record. Omit all parts of the record not herein directed to be printed.

Print also the copy of the index to the record from which said paging is taken, which copy is hereto attached as part thereof, printing therewith the word "omit" where it has been inserted on the right-hand side thereof.

1261 INDEX.

	Page.	
Original bill	1	
Subpœna	73	
Joint answers of N. Tumlin, G. H. Tumlin, Mary L. Spencer, and Lulu T. Lyon	77	
Answer of Gray and his sureties, Dobbins & Neil	80	
Answer of sureties on bond of Gray and Erwin	91	
Demurrer to bill	94	
Order for hearing on demurrer	96	Omit.
Order resetting hearing on demurrer	97	Omit.
Order overruling demurrer	98	
Opinion and order — court granting injunction and appointing receiver	99	Omit.
Injunction	102½	Omit.
Return of marshal	103	Omit.
Bond of receiver	104	Omit.
Order—reference to special master	109	
Answer—John Neal	111	Omit.
Order making Huguley party defendant	118	Omit.
Order abating case as to King	119	Omit.

	Amendment to bill	120	
	Answer of F. P. and Cora M. Gray	125	
	Answer of H. C. and J. G. B. Erwin	129	
	Answer of H. C. Ramsour	133	
	Answer of J. M. Veach *et al.*	137	
	Replication	145	
	Order on replication	147	
	First report special master	148	Except.
	Exceptions to master's report by def'ts Benham, Rogers, Trimble, Mitchell, Veach, Howard, H. C. & J. G. B. Erwin, and H. C. Ramsour	231	
	Exceptions by complainants	236	Except.
1262	Additional exceptions by complainants	252	Omit.
	Exception — F. P. Gray, adm'r	279	Omit.
	Petition of J. Veach *et al.*, sureties on bond Gray & Erwin	288	
	Order allowing def'ts, Erwin *et al.*, to file answer	292	
	Joint Affidavit of J. G. B. & H. C. Erwin, with power of attorney and telegram	293	
	Affidavit of John A. Erwin	301	
	Order recommitting case to special master	305	
	Second general report of special master	308	
	Report of special master on exceptions of compl'ts	322	
	Report of special master on liabilities of sureties on first bond of Gray and Erwin	342	
	Report of special master on exceptions of Gray	350	
	Report of special master on exceptions of Benham, Rogers, *et al.*, sureties on bond of Gray & Erwin	363	
	Exceptions of compl'ts to master's report filed Oct. 4th	366	
	Exceptions of Veach *et al.*	371	
	Amended answer & petition of Cora M. Gray	373	
	Index to testimony before special master	376	Omit.
	Testimony	378 to 812	Omit.
	Exhibit A to master's report	813	
	" B "	816	
	" C "	830	
	" D "	882	
	" E "	943	Omit.
	" F "	971	Omit.
	" G "	1002	Omit.
	" H "	1017	Omit.
	" I "	1029	Omit.
	" L "	1048	
	" N "	1049	
	Exhibit M to master's report	1058	
1263	" O "	1060	
	" P "	1070	
	Exhibit Q to master's report	1073	
	" R "	1077	
	" S "	1089	
	" T "	1090	
	" U "	1091	
	" V "	1092	
	" W "	1093	
	" X "	1094	
	" Y "	1095	
	Consent to read before master int. and testimony of Cook and Dodson	1103	Omit.
	Testimony — Cook and Dodson, with exhibits	1109	Omit.
	Oral testimony of Benham, Howard, and others as to validity of bond	1120	
	Int. and deposition of J. A. Erwin	1129	
	Int. and deposition of J. G. B. and H. C. Erwin as to bond	1136	
	Application of John A. Erwin for leave to resign as adm'r and proceedings thereupon, including answer of respondent	1149	
	Power of attorney to sign bond	1183	
	Int. and deposition of J. A. Howard	1196	Omit.
	Petition of Cora M. Gray	1203	

Petition of J. E. Leake and order thereupon 1208
Dismissal as to Wofford 1213½
Final decree 1214
Notice of appeal and order thereupon 1235
Report of master on appeal bond 1240
Appeal bond 1243
Petition and order on appeal 1247

1264 In the United States Supreme Court.

J. M. VEACH *et al.*, Appellants, *vs.* JAMES L. RICE & WIFE *et al.*, Appellees.

We, the counsel for the appellees, W. K. Moore, and P. L. Mynatt & N. J. Hammond, counsel for appellants aforesaid, acknowledge and agree as follows: Said Moore hereby acknowledges due & legal service of notice of the foregoing points to be relied upon in the Supreme Court by said appellants & of the parts of the record which they wish printed, & agree that the foregoing paper hereto may be filed in the clerk's office within the time allowed by the court in this cause, & that no other service of notice of said points & printed — be made, and both sides agree that at any time either party may print any omitted part as supplemental to the printed record, giving the other side notice & a copy thereof thirty days before the hearing.

We, for appellants, admit that each annual return by Gray (after the first by himself & Erwin) were found to be incorrect, in that he did not charge himself with all monies collected in the preceding year & claimed credit to which he was not entitled.

W. K. MOORE,
Att'y for Appellees.
N. J. HAMMOND AND
P. L. MYNATT,
For Appellants.

1265 [Endorsed:] Supreme Court U. S. 1887, October term. No. 484. James M. Veach *et al.*, app'ts, *vs.* Ada S. Rice *et al.* Statement of errors & parts of record to be printed, with stipulation of counsel in regard to printing.

[Stamped:] Office Supreme Court U. S. Filed May 28, 1887. James H. McKenney, clerk.

Endorsed on cover: N. Georgia C. C. U. S. No. 484. James M. Veach, Robert L. Rogers, A. C. Trimble, W. I. Benham, John J. Howard, and A. W. Mitchell, appellants, *vs.* Ada S. Rice, Mary L. Spencer, Napoleon B. Tumlin, *et al.* Filed November 25, 1885.

Supreme Court of the United States.

OCTOBER TERM, 1886.

No. 810.

J. M. VEACH, ET AL., APPELLANTS,

vs.

JAMES S. RICE AND WIFE, APPELLEES.

APPEAL IN EQUITY.

Petition of Appellants for Leave to Print Only Part of the Record and Brief Thereon.

N. J. HAMMOND,
P. L. MYNATT,
Attorneys for Appellants.

JUDD & DETWEILER, PRINTERS.

Supreme Court of the United States.

OCTOBER TERM, 1886.

No. 810.

J. M. VEACH, ET AL., APPELLANTS,

vs.

JAMES S. RICE AND WIFE, APPELLEES.

APPEAL IN EQUITY FROM CIRCUIT COURT OF SOUTHERN DISTRICT OF GEORGIA.

PETITION.

To the Supreme Court of the United States:

The petition of appellants most respectfully shows that the record in this case, as transmitted from the court below, contains a large amount of matter not pertinent to the issues between the parties. The appellants in this case were sureties upon the bond of Erwin and Gray, joint administrators of Lewis Tumlin, deceased. This joint administration terminated in about nine months, by the resignation of Erwin. Gray was at the same time appointed sole administrator, and gave a new bond with other sureties. After several years, Rice and wife, non-resident heirs, filed a bill against Gray and his sureties, and also made the sureties on the joint bond

defendants. The court below held the sureties on the joint bond of Erwin and Gray liable for the delinquencies of Gray, while sole administrator. The appellants, who were sureties upon the joint bond, insist that they are not liable for the delinquencies of Frank Gray after the resignation of Erwin. The larger part of this very long record, including pleadings, evidence, and reports of master, is to show Gray's defaults. The appellants make no question as to these after Erwin's resignation. They insist that they are not liable for them, whether great or small. In other words, the character and amount of the delinquencies of Gray, after the resignation of Erwin, cannot affect the questions made by appellants in this record. To show that appellants are not responsible for this voluminous record, and that they have sought to reduce it by agreement, see affidavit marked Exhibit A, hereto attached.

The prayer of petitioners is that they have leave to print only so much of the record as is pertinent to the matters in issue. This petition will be presented to the Supreme Court for the order asked on the first Monday in February, 1887.

N. J. HAMMOND,
P. L. MYNATT,
Attorneys for Appellants.

[EXHIBIT A.]

IN SUPREME COURT UNITED STATES.

J. M. VEACH, *et al.*, Appellants,

vs.

RICE AND WIFE, *et al.*, Appellees.

P. L. Mynatt, one of the counsel for J. M. Veach and others in the court below, makes oath that as such counsel he has proposed to the counsel representing Rice and wife and others,

the appellees, to omit in printing the record in the Supreme Court all that is not pertinent to the question made by the appellants, the record being very voluminous, and a large part of it having no bearing at all upon the questions made by the appellants, as clearly appears by inspection of the record. Affiant's proposition, however, has been peremptorily rejected by those representing the opposite party. Affiant will also state that when the record was being copied by the clerk of the circuit court, he told the clerk that it was not necessary to incorporate all this irrelevant matter, and received for response that the other side required that it should all go in.

P. L. MYNATT.

Sworn to and subscribed before me this 1st day of December, 1886.

O. C. FULLER,
Deputy Clerk, Circuit Court.

We acknowledge that we have this day been served with a copy of the within.

January 10th, 1887.

W. K. MOORE,
JAMES R. CONYERS,
Attorneys for Appellees.

BRIEF.

Erwin and Gray became joint administrators of the estate of Tumlin in Georgia, giving Veach *et al.* as security on their joint bond. In less than one year Erwin petitioned to resign. That was allowable under the statute of the State declaring that "any administrator who, from age or infirmity, removal from the county, or for other cause, desires to resign his trust, may petition the Ordinary, stating the

reasons, and the name of a suitable person qualified and entitled to and willing to accept the trust; whereupon the Ordinary shall cite such person and the next of kin of the intestate, to appear and show cause why the order should not be granted. If no good cause be shown, and the Ordinary is satisfied that the interest of the estate will not suffer, the resignation shall be allowed, and the administrator shall be discharged from his trust whenever he has fairly settled his accounts with his successor and filed with the Ordinary the receipt in full of such successor." Code of Ga., 1883, § 2610.

The petition named said Gray as successor. Erwin settled with him and took his receipt. Thereupon the Ordinary discharged Erwin and the sureties on the joint bond, and took from Gray a new bond with new sureties. On appeal this was affirmed by the superior court. Rice *et al.*, heirs-at-law of Tumlin, filed their bill for account and settlement, in United States court for northern district of Georgia, against Gray, administrator, and the sureties on both bonds. It was referred to a master and the cause was tried below upon exceptions to his report. The reported default of Gray was for, say, $6,000 up to that discharge, and for, say, $36,000 more after that discharge. The decree was against Gray and both sets of sureties for the total—say $42,000—despite the contention by Veach *et al.*, sureties on the first bond, only that they were not liable for any default after that discharge.

The sureties on the joint bond, Veach *et al.*, alone appealed. They do not dispute Gray's liability for the said amount of default after the discharge, but deny their liability therefor as sureties. The exceptions to the master's report making the issues here to be tried apply to the record up to and including said discharge.

The voluminous annual returns of Gray as administrator after said discharge are irrelevant and worse than useless here. To print the entire record will cost, say $1,350; to print what is material will cost, say $150.

These are the facts as understood by Mr. Hammond who has been employed in the cause since the record was sent here.

This Court will consider nothing but the specific exceptions to the master's report, on which the cause was tried below.

Harding *vs.* Handy, 11 Wheat., 103–4.
Story *vs.* Livingston, 13 Peters, 359–366.
Brocket *vs.* Brockel, 3 Howard, 691.
McMecken *vs.* Reveir, 18 Howard, 507.

Though the act of 1803 required the clerk below to send up the entire record "and all the proceedings of what kind soever in the cause," part might be omitted by consent of counsel.

Conn *et al. vs.* Penn., 5 Wheat., 424–425.

But here counsel for complainants, Rice *et al.*, would not consent. (See petition and affidavit, *ante.*)

The act of 1803 has been modified so that "a transcript of the record as directed by law to be made, and copies of the proofs, and of such entries and papers on file as may be necessary on the hearing of the appeal, shall be transmitted to the Supreme Court," &c. Rev. St. U. S., § 698.

Even with that positive statute this Court severely animadverted upon more being sent here than "all that is material for the proper presentation of the cause."

Railway Co. *vs.* Stewart, 95 U. S. R., 279–284.

Those at fault will be punished in awarding costs. *Ib.*

The petition shows how Mr. Mynatt, of counsel for appellant, tried to reduce the record into the bounds suggested in 95 U. S. R., 284 *supra*, and the other side objected.

It is useless to inquire what else he might have done for that purpose. The whole record, &c., is here, and the question is whether all of it shall be printed. Our opponents refuse to consent to print less than all sent up.

Rule 8, pt. 3, requires filing "a complete record," &c., but the latter part of it defines that to be what is "necessary to the hearing in this Court." All has been filed here.

Prima facie "the record," which under Rule 10, pp. 1, 2 3, and 6, must be printed, means, all "filed." But the Court made the rules to aid in administering justice, and will not interpret them so as to make them a burden instead of a help to the Court.

Again: "It is always in the power of the Court to suspend its own rules or to except a particular case from its operation, whenever the purposes of justice requires it."

U. S. *vs.* Breitling, 20 How., 252.

We fear to print less than the "complete record" without permission first had. The interests of our clients and our sense of duty compel us to ask such permission.

We know no case directly in point unless it be Nelson Richmond *et al. vs.* Cincinnati Furnace Co., Ohio Weekly L. Bul., 26th Oct., 1886, p. 339. It is there stated that the Ohio Supreme Court dispensed with printing a record. The

opinion we have not seen. Perhaps there was none written. We believe their rule is like that of this Court.

Our case is No. 810 and perhaps two years off yet. There is time for the Court to adopt any plan and give opposite side such notice as will save them from harm. Should we print so that they should need more, wrongfully omitted by us, they can print omitted parts and we be made to pay costs accordingly.

The Court might appoint its clerk a special master to determine the issues, if indeed any will be made, about what is material.

We pray for such order as the Court thinks the situation requires.

P. L. MYNATT,
N. J. HAMMOND,
Of Counsel for Appellants.

Office Supreme Court U. S.
FILED.
DEC 24 1888
JAMES H. MCKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No 208.

JAMES M. VEACH, ROBERT L. ROGERS, A. C. TRIMBLE, W. I. BENHAM, JOHN J. HOWARD AND A. W. MITCHELL, *Appellants.*

VS.

ADA S. RICE, MAY L. SPENCER, N. B. TUMLIN, *et al.*

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

ABSTRACT OF FACTS AND BRIEF OF ARGUMENT FOR APPELLANTS,

BY

P. L. MYNATT AND N. J. HAMMOND.

ATLANTA, GEORGIA:
THE FRANKLIN STEAM PRINTING HOUSE.
1888.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.—No. 208.

JAMES M. VEACH, ROBT. L. ROGERS, A. C. TRIMBLE, W. I. BENHAM, JOHN J. HOWARD and A. W. MITCHELL, appellants,

vs.

ADA S. RICE, MAY L. SPENCER, NAPOLEON B. TUMLIN *et al.*, appellees.

Appeal from the Circuit Court of the United States for the Northern District of Georgia

ABSTRACT OF FACTS.

Frank P. Gray and John A. Erwin were appointed administrators of the estate of Lewis Tumlin, deceased, of Bartow county, in the State of Georgia. On the second day of August, 1875, they executed a bond as such administrators, in the sum of six hundred thousand (600,000.00) dollars, with William T. Wofford, Abner Johnson, John W. Gray, James M. Veach, Noah King, Edwin M. Price, A. C. Trimble, Joel H. Dyer, W. W. Rich, James C. Wofford, Nelson Gilreath, John J. Howard, A. W. Mitchell, Thomas Stakely, R. L. Rogers, L. R. Ramsour, J. G. B. Erwin, Henry C. Erwin, W. I. Benham, John S. Leake and Thomas Tumlin, as sureties, payable to the Ordinary of Bartow county, the following being the condition of said bond:

"The condition of the above obligation is such that if the above bound Frank P. Gray and John A. Erwin, ad-

ministrators of the goods, chattels and credits of Lewis Tumlin, deceased, do make a true and perfect inventory of all and singular the goods, chattels and credits of the said deceased, which have or shall come to the hands, possession or knowledge of the said Frank P. Gray and John A. Erwin, or in the hands or possession of any other person or persons for them, and the same so made do exhibit in the Court of Ordinary of said county, when they shall be thereunto required, and such goods, chattels and credits do well and truly administer according to law, and make a just and true account of their actings and doings therein when required by the Superior Court or the Ordinary for the said county, and all the rest of the goods, chattels and credits which shall be found remaining upon the account of the said administrator, the same being first allowed by the said court, shall deliver and pay to such persons respectively as are entitled to the same by law; and if it shall hereafter appear that any last will and testament was made by the said deceased and be proved before the court, and the executors obtain a certificate of the probate thereof, and the said Frank P. Gray and John A. Erwin do in such case, if required, render and deliver up the said letters of administration, then this obligation to be void; else to remain in full force."

Said administrators proceeded to administer the affairs of said estate until on April 11th, 1876, and most of the real estate and much of the personalty was distributed and delivered to the distributees. Then John A. Erwin filed his petition in the Court of Ordinary of Bartow county for permission to resign as administrator. At the May term of the Court of Ordinary, 1876, the order allowing Erwin to resign was passed by the Ordinary, and by the same order F. P. Gray was appointed sole administrator, and required to give a new bond and security in the sum

of one hundred and forty thousand dollars; and by the same order the securities upon the joint administration were discharged from all liability for any mismanagement of the said estate in the future, but not for any past liability of said Erwin as administrator.

F. P. Gray proceeded to administer the estate. On the 10th of August, 1881, a bill was filed by Ada S. Rice, one of the heirs of Lewis Tumlin, deceased, against F. P. Gray and John A. Erwin, and all the securities on their said joint bond, as well as all the securities on the other bonds executed by F. P. Gray, charging various delinquencies on the part of said F. P. Gray, but charging no fraud or default on the part of Erwin. The securities on the joint bond of Gray and Erwin insisted that they were liable only for the joint administration. The court below held that they were liable for the administration of F. P. Gray after the resignation of Erwin, and while F. P. Gray was sole administrator under his said bond of one hundred and forty thousand dollars.

This brief presentation of the facts puts the court in possession of the main question in this case. But a more minute statement is necessary to a proper understanding of the case in its details, as it appears of record in this court.

The bill in this case was filed by Ada S. Rice and her husband James L. Rice, citizens of the State of Tennessee, in the United States Circuit Court at Atlanta, Georgia. They stated in said bill that Lewis Tumlin died on the second day of June, 1875, in the county of Bartow, intestate, leaving as his heirs at law his widow, Mary L. Tumlin, now Mary L. Spencer, (she having married H. L. Spencer after the death of said Lewis Tumlin,) Napoleon B. Tumlin and George H. Tumlin; Ada S. Tumlin, now Ada S. Rice; Lula T. Lyon, formerly Lula T. Tumlin; Cora M. Gray, formerly Cora M. Tumlin, and

Lewis T. Erwin, the son of a deceased daughter, who had conveyed his interest to John S. Leake. This makes seven shares in the distribution of said estate, the widow having elected to take a child's part. The bill then proceeds to state something of the character of the estate, to-wit: Lands, personal property of various description, including cash, bank-stocks, notes, accounts, mortgages and other assets, rights and credits, being of the aggregate value of about three hundred thousand dollars.

The bill further stated that temporary letters of administration were granted to Frank P. Gray and Napoleon B. Tumlin, which temporary letters continued until the second day of August, 1875, at which time Frank P. Gray had control and management of said estate. That on the second day of August, 1875, Frank P. Gray and John A. Erwin obtained letters of administration and gave bond as administrators in the sum of six hundred thousand dollars, with securities mentioned above; that Gray was then young and inexperienced and was selected by the widow, to which complainants consented if they would associate with him said Erwin, an excellent business man, and if he would give his personal attention to the estate; that the said John A. Erwin had since that time removed from the State of Georgia to the State of Tennessee. Complainants stated that they were informed and believed that Erwin became so much dissatisfied with the conduct of his co-administrator, Gray, and so much alarmed with threatened liability on account of Gray, that he resigned his trust, to avoid the consequences of said Gray's waste and mismanagement; that he even consented to surrender to said Gray his commission and compensation for the sum of three hundred dollars, provided Gray would indemnify him and his securities against loss, which the said Gray accordingly did, and that thereupon Gray became sole administrator against the wishes

of some of the heirs. The bill here set out the sureties on Gray's bond as sole administrator. It further stated that on the 18th day of October, 1877, three of his sureties, to-wit: William T. Wofford, James C. Wofford and and William M. Rich applied to be relieved from their suretyship on the bond of said Gray, on account of their lack of confidence in said Gray, that they were so relieved, and that Gray gave a new bond as such administrator for the same sum of one hundred and forty thousand dollars with the other securities mentioned in said bill. It was further alleged that on the sixth day of May, 1878, Noah King, one other of the sureties mentioned, applied to be relieved; that he was relieved, and Gray gave another bond in like sum with additional sureties. The bill then proceeded to detail at great length complaints against said Gray as administrator. The bill stated that Gray resigned his trust as administrator on the 18th day of June, 1881.

The appellants did not file an answer to this bill until the 9th of October, 1883. By making an affidavit they were permitted to answer at that time. (See printed record, pages 44, 45, 46 and 47.) They stated in their answers that from information as to the contents of said bill, complainants had made no charges against them, nor asked any relief against John A. Erwin, as surety. They stated that they were mislead as to the purposes of the bill, and had not answered it until an amendment was made to the bill charging John A. Erwin and his sureties as being liable for the delinquencies of Frank P. Gray; that a rumor that the special master was going to report the sureties on the joint bond liable for the delinquencies of Frank P. Gray, as sole administrator, was the first notice the appellants had that there was any liability upon them, because of anything that Frank P. Gray had done in his sole administration.

and your petitioner prays that each of said heirs-at-law of said Lewis Tumlin, hereinbefore named, may be cited by your honor to be and appear before your honor on the first Monday in May next, then and there to show cause, if any they have, why your petitioner should not resign his office of administrator as aforesaid, on his complying with the law in such case made and provided.

And your petitioner will ever pray, etc.

JOHN A. ERWIN.

April 11, 1876.

GEORGIA—Bartow County.

Ordinary's Office.

To Mrs. Mary L. Tumlin, Napoleon Tumlin, Mrs. Lula T. Lyon, Frank P. Gray and all the other persons named in the foregoing petition as heirs-at-law of, and distributees of, the estate of Lewis Tumlin, deceased, and to the guardians of the minor heirs, named in said petition:

You are hereby cited and required to appear at the Court of Ordinary, to be held on the first Monday of May next, then and there to show cause, if any you have, why John A. Erwin, one of the administrators on the estate of Lewis Tumlin, deceased, should not be permitted to resign the office of administrator of said estate, for the cause set forth in said petition, when the law in such case made and provided is fully complied with; and it is further ordered that each of said heirs-at-law who are of full age, and the guardians of the minor heirs, be served with a copy of the foregoing petition and this citation (unless they should acknowledge service) ten days before the time appointed for hearing said petition and passing on the same.

Given under my hand and seal of office, this April 11, 1876. J. A. HOWARD, Ordinary.

Filed in office April 12th, 1876,

J. A. HOWARD, Ordinary.

Due and legal service of the petition and citation was acknowledged by all the distributees and further service waived, April 13, 1876.

Said John A. Erwin made the acknowledgement and waiver for G. H. Tumlin and L. T. Tumlin, for whom he was guardian, and Frank Gray, for his ward, Cora Gray.

Thereupon was written: "I Frank P. Gray, one of the administrators of Lewis Tumlin, deceased, do hereby signify my willingness for John A. Erwin, my co-administrator of said estate, to resign for the reasons set forth in his petition, I retaining the sole administration in my own name, and I hereby propose to file such bond, and in furtherance of thesame, as the Ordinary may deem proper in the premises.

Done this May 1st, 1876.

FRANK P. GRAY.
Administrator of Lewis Tumlin, deceased."

Filed in office May 1st, 1876.
JOHN A. HOWARD, Ordinary.

APPLICATION OF THE ADMINISTRATOR TO RESIGN THE ADMINISTRATION IN COURT OF ORDINARY, BARTOW COUNTY. REGULAR TERM. MAY 1ST, 1876.

John A. Erwin, one of the administrators of Lewis Tumlin, deceased.

vs.

Frank P. Gray, adm'r; Frank P. Gray, guard.; Mary L. Tumlin, Napoleon Tumlin *et al.*, heirs-at-law, etc.

Upon considering the above and foregoing application of John A. Erwin, one of the administrators on the estate

of Lewis Tumlin, late of Bartow county, deceased, for leave to resign his said office of administrator, and all the heirs-at-law of Lewis Tumlin having been duly served with citation, to show cause why John A. Erwin should not be allowed to resign the office of administrator on the estate of Lewis Tumlin, deceased, and all of said heirs being represented now before the court, and no sufficient cause being shown why said Erwin should not be allowed to resign his trust as administrator, as aforesaid, and it appearing to the court that the bodily health, physical infirmities, and the health of his wife, are such that he is unable to give his attention to the management of the business of said estate, and Frank P. Gray, being cited to appear before the court, and having been served with said citation, and now coming before the court and expressing a willingness to accept the office of administrator of the estate of Lewis Tumlin, deceased, and it appearing to the court that the allowing of said Erwin to resign his office of administrator will not injure the interest of said estate in any way; therefore, ordered and adjudged by the court, that the resignation of the said John A. Erwin of the office of administrator on the estate of Lewis Tumlin, deceased, be and the same is hereby allowed, and it is hereby further ordered and adjudged by the court, that Frank P. Gray, the co-administrator of said John A. Erwin, upon the estate of the said Lewis Tumlin, deceased, be and he is hereby declared and appointed sole administrator of the estate of the said Lewis Tumlin, deceased, and the said Frank P. Gray is hereby required to give a new bond and security for the faithful administration of said estate, in the sum of one hundred and forty thousand dollars, and upon said bond and security being given, and the said John A. Erwin, upon his settling and accounting with the said Frank P. Gray, the sole and remaining administrator of the estate of Lewis Tumlin,

deceased, his successor, of his accounts as administrator, and the filing the receipt of his successor in the Ordnary's office, as provided by law, and upon so doing that the said John A. Erwin as administrator and his securities, be and they are hereby discharged from any and all liability for any mismanagement of said estate in the future, but not from any past liability of the said John H. Erwin, as administrator as aforesaid.

Granted in open court, May Term, 1876.

J. A. HOWARD, Ordinary.

APPLICATION FOR DISCHARGE, etc.

COURT OF ORDINARY, BARTOW COUNTY,
ADJOURNED TERM.

John A. Erwin, adm'r of estate of Lewis Tumlin, deceased.

JUNE 12th, 1876.

Upon considering the above application of John A. Erwin, one of the joint administrators of the estate of Lewis Tumlin, late of Bartow county, deceased, for a discharge, and the said John A. Erwin, as administrator, having by order of this court been permitted to resign said trust, and which resignation has been accepted by the court, and Frank P. Gray, his co-administrator, having consented to accept the entire administration of said estate, and having given new bond and security, as ordered by the court, and the said John A. Erwin having filed a return, showing the property that has been administered belonging to said estate, and having filed the said Frank P. Gray's receipt for all the unadministered property belonging to said estate, and being satisfied that said return and receipt contain all the property, administered and not ad-

ministered, belonging to said estate, which has come into the hands of said John A. Erwin, as administrator, it is therefore ordered, that the said John A. Erwin be and he is hereby fully discharged from the office of administrator on the estate of Lewis Tumlin, deceased, and that letters of dismission do issue to him.

Granted in open court, June adjourned, term, 1876.

J. A. HOWARD, Ordinary.

From this order, discharging John A. Erwin from the administration of said estate, the heirs took an appeal to the Superior Court of Bartow county, which was tried in said court, and the following verdict rendered in favor of Erwin's resignation: "We, the jury, find in favor of John A. Erwin, and that his resignation be allowed." Signed by the jury. (See the printed record, page 128.) The heirs then took an order allowing them time in which to make a motion for a new trial, preparatory to taking the case to the Supreme Court. (See printed record *Ib.*) This ended the case in the Superior Court, as no motion was made further in the cause. There was a failure, however, on the part of Erwin's counsel to sign judgment upon the verdict of the jury above recited, and because of this, an application was made to the Superior Court of Bartow county to sign judgment *nunc pro tunc*, at January term, 1884, of said court. (See printed record, pp. 172, 173.) All parties at interest were cited. (See printed record, pp. 175, 176 and 177.) As appears from the record (pages last cited), John A. Erwin had died, and the application to have judgment *nunc pro tunc* signed was made by his representative, appointed in Tennessee. (See printed record, p. 178.) The heirs showed cause at great length, as appears from the printed record, pages 180 *et seq*. Finally, the matter was heard in the Superior Court, and an order passed allowing the judgment *nunc pro tunc*. (See printed record, page 186.)

COMMISSIONS.

In reference to commissions allowed Gray and Erwin for dividing the property in kind, the evidence consisted in part in the following proceeding in the Court of Ordinary, of Bartow county: (See printed record, pages 125 and 126.)

GEORGIA—Bartow county:

Application for order allowing commission on property delivered to the distributees in kind.

Court of Ordinary, Bartow County,
Regular Term, May 1st, 1876.

Frank P. Gray, John A. Erwin, administrators estate of Lewis Tumlin, deceased, to the Ordinary of said county:

The petition of Frank P. Gray and John A. Erwin, who are administrators of Lewis Tumlin, deceased, show to the court as follows: That they, as administrators aforesaid, have distributed to the heirs-at-law of the said deceased the following real estate, which was taken at the appraised value hereinafter set forth, and the same turned over to the parties set forth:

The Sproull plantation, * * * to Mrs. Rice,	$ 9,000 00
House and lot in Cartersville known as the Erwin place, * * *	3,250 00
House and lot in Cartersville known as the James Milan place, * * *	3,000 00
Storehouse and lot on Main street in Cartersville, occupied by S. F. Milan & Co., to Mrs. Rice	2,500 00
Storehouse and lot now occupied by Meyer & Co., * * * in Cartersville, to L. T. Erwin	2,500 00
Storehouse and lot in Cartersville, on Main street, * * * to L. T. Erwin.....	1,800 00
The home place, divided between the seven heirs to said estate, appraised at.....	92,406 00
Making the sum total of. * * * * * . .	$114,456 00

The responsibility and trouble in effecting the transfer has been considerable. Your petitioners allege that they have received no compensation at all for this service, thus rendered said estate, and pray your honor to pass an order allowing them three per cent. on said sum of $114,456.00, as commission on the same.

And your petitioners will ever pray, etc.

WOFFORD & MILNER,
W. T. WOFFORD,
A. JOHNSON,
Attorneys for Petitioners.

Upon considering the above application of John A. Erwin and F. P. Gray, administrators of the estate of Lewis Tumlin, deceased, for extra compensation for delivering and dividing to the heirs-at-law the real estate in kind belonging to said deceased, it is ordered by the court, that they be and are hereby allowed three per cent. on the appraised value of the property so delivered in kind to said distributees, to-wit, on the sum of ($114,456.00) one hundred and fourteen thousand four hundred and fifty-six dollars.

Granted in open court, May term, 1876.

J. A. HOWARD, Ordinary.

There was much evidence as to the value of their services in making that division introduced before the master.

The return of those who divided the realty appears fully in the printed record at pages 131 to 137 inclusive.

As to the time of making his annual returns, the printed record shows as follows: On the 2d of July, 1877, the court ordered that he have until the first Monday in August, "because the business of said estate is such that said administrator cannot make his annual return to-day," and

"that he be saved forfeiture of commissions on the same." Page 137.

On the 6th of August, 1877, a like order was made, "the business of the estate requiring his time to prepare case of said estate for July term of Bartow Superior Court." *Ib.*

In July, 1879, a like order gave him time until September, because "he has been confined for a week past to his room with fever, in consequence thereof has been unable to finish his annual return by July 1st, . . and he further shows that the Superior Court of said county will be in session from the second Monday in July until beyond the first Monday in August, and he will not be able to get said returns ready before the first Monday in September." *Ib.*, 138. Like orders were passed in subsequent years. See printed record, pp. 138 *et seq.*

REPORT OF MASTER.

The said special master made his report September 22d, 1883. (See printed record, page 48 *et seq.*) Among other things not necessary to be stated in this abstract, he reported that on May 1st, 1876, Gray and Erwin, as administrators, made application in writing to the Ordinary of Bartow county, asking that they be allowed three per cent. on $114,456.00, as commissions and compensation for their services in and about the division in kind of the real estate of said deceased Tumlin. The master reported that the petition was not sworn to, but stated the responsibility and trouble of the duties. He further stated that there was no prayer for process, or rule calling on heirs to show cause, and it does not appear but that it was an entirely *ex-parte* proceeding. The Ordinary granted the prayer May term, 1876. The joint administrators, Gray and Erwin, made their first annual return May 22d, 1876. This return was examined and al-

lowed by the Ordinary, and made the judgment of the court June 26th, 1876, and recorded July 1st, 1876. The master further reported as follows: (See printed record, pages 53 to 55.)

ERWIN APPLIES FOR DISCHARGE.

On April 11th, 1876, John A. Erwin, one of said administrators, filed his petition in said court of Ordinary, seeking permission to resign his office as such administrator, on the ground that his health was so bad he could not properly attend to the duties of the office. The petition alleges that most of the real estate and a great portion of the personalty of said estate had been divided and delivered to the distributees; that Gray, the other administrator, is willing to give new bond and carry on the administration alone. The petition gives the names and residences of each distributee; shows that said Erwin was the guardian of two of them, to-wit: George Henry Tumlin and Lewis T. Erwin; prays that all the distributees be cited to appear and show cause.

On the same day, April 11th, 1876, the Ordinary issued the order, requiring the various distributees to show cause at May term, 1876, of said court.

All the parties were duly served, or acknowledged or waived service, said John A. Erwin acknowledging service for his said wards. F. P. Gray, on May 1st, 1876, put in writing his willingness for said Erwin to resign, and he, Gray, to retain the sole administration in his own hands, and offering to give such bond as the Ordinary should require.

ERWIN'S DISCHARGE.

At May term, 1876, of said court, the order allowing Erwin to resign was granted. The order, among others, recited the following: That all the heirs have been duly

served with citation to show cause why Erwin should not be allowed to resign, etc., and all of said heirs being represented now before the court, and no sufficient cause being shown to the contrary, and it appearing to the court that the bodily health, physical infirmities of said Erwin, and the health of his wife are such that he is unable to attend to said duties, that said Gray is willing to act as sole administrator, he being also served and appearing, and that such resignation will not injure the estate in any way.

GRAY, SOLE ADMINISTRATOR.

By same order, F. P. Gray was appointed sole administrator, and required to give a new bond and security in the sum of $140,000. When said bond was given, and Erwin settled with Gray as to the administration, and filed Gray's receipt as successor in the Ordinary's office, then said Erwin and his securities should be discharged from all liability for any mismanagement of said estate in the future, but not for any past liability of said Erwin as administrator. Erwin's petition for discharge says nothing about discharging his sureties. (See, as to this, item 12, exhibit N).

GRAY GIVES NEW BOND.

On May 2d, 1876, Gray gave new bond in the sum of $140.000, conditioned, substantially, as the bond described in item three of this report. The sureties to Gray's bond were Abda Johnson, William T. Wofford, Edwin M. Price, Noah King, W. W. Rich, J. W. Gray, J. C. Wofford, John S. Leake, Thomas W. Leake and Nelson Gilreath.

See exhibit C, to exhibit B, of this report.

GRAY GIVES ERWIN FINAL RECEIPT.

On the 6th of May, 1876, F. P. Gray gave to J. A.

Erwin a receipt for all of the property of the estate which had been in Erwin's possession as co-administrator.

A list or schedule of the property was given and declared to be all the property belonging to said estate at that time unadministered, so far as known by said Gray, except some wild lands. Said Erwin filed said receipt in the Ordinary's office May 22d, 1876.

See exhibit O to this report.

ERWIN DISCHARGED.

On June 12th, 1876, at an adjourned term, the order of final discharge of said Erwin was passed. See exhibit N, above.

APPEAL TO SUPERIOR COURT OF BARTOW COUNTY.

The decision of the court of Ordinary permitting said Erwin to resign and Gray to become sole administrator, was appealed from and the case carried to the Superior Court of Bartow county, and there, on August 4th, 1876, affirmed by verdict of a jury. There is no record evidence that a judgment was entered upon said verdict. The decision appealed from was, as before shown, made May 1st, 1876, and the appeal must have been sued out or entered within four days from the adjournment of said May term, not counting Sundays or holidays. See exhibit P to this report; Code of Georgia, 3613, 3614.

GRAY GIVES BOND TO ERWIN.

On June 16th, 1876, F. P. Gray gave the bond to said John A. Erwin in the sum of $40,000, with his sureties, D. W. K. Peacock, John W. Gray, Edwin M. Price and John S. Leake, reciting, among other things, that said Erwin has and does by said presents transfer, assign, turn over and deliver, to said F. P. Gray, all the commissions

and compensations that had been or might be allowed by the Ordinary or the law of the State to said Erwin, for his services as administrator of said estate, and then, in consideration thereof, said F. P. Gray bound himself, his heirs, etc., to pay and satisfy any judgment or decree or order that might be made, rendered or pronounced, by any court of law or equity, and all expenses or costs necessarily incurred in defense of any suit against the said John A. Erwin, for any waste, loss or damage, or injury caused or occasioned by any act or failure of duty in any way whatever by the said John A. Erwin, administrator of said estate, to any heir-at-law or creditor of said Lewis Tumlin. By said bond said Gray obligated himself to protect and save harmless, in like degree, the sureties of said Erwin on said Erwin's administration bond. See exhibit Q to this report.

On the subject of resignation the special master reported, on pages 59 and 60 of the printed record, as follows: The evidence shows that Erwin did not apply to the court of Ordinary for a discharge of the sureties, and that no such application was made on their behalf. Erwin applied for his own discharge as administrator, and not as surety to Gray; hence there was not and could not have been any binding order or judgment of discharge of any of the said sureties under the pleadings, unless the discharge of Erwin as administrator, as matter of law, discharged the sureties. Did it have that effect or not?

The evidence shows that, on Erwin's discharge as administrator, Gray was not reappointed to the office of administrator, and took the estate as administrator *de bonis non*, but he continued in office; his was not a new administration, but the trust continued in him. Items 12 to 16 Ev., p. 388.

It is some act of the creditor and not the act of the law which discharges a surety. Code, 2152, 2154, 2862. In

this case, Erwin's discharge as administrator was the act of the law, and not the act of the creditors or the parties at interest. The Ordinary was not the real party at interest, but only the nominal party, the heirs and creditors of Tumlin's estate being the real parties; hence I conclude that Erwin's discharge did not have the effect to discharge the sureties on the bond given by Gray and Erwin.

EXCEPTIONS TO REPORT.

The appellants, together with H. C. Erwin, J. G. B. Erwin, H. C. Ramsour, administrators, filed exceptions to the report of said special master, which exceptions are (pages 69 to 71, printed record) as follows:

Exception 1st: For that the said master has, by his said report, certified that he was of opinion that the discharge of John A. Erwin, as co-administrator, did not discharge him as surety for his co-administrator, Frank P. Gray, and for that he has further certified, that he is of opinion that the order of the Ordinary of Bartow county, made on the — day of May, 1876, discharging the sureties of Erwin and Gray on their bond as administrators of Lewis Tumlin, deceased, was a nullity, and did not in fact release said sureties.

Under the first exception, reference is made here to pages 11, 12 and 13 of the said special master's report; also to pages 23 and 24 and 25 of said report.

Exception 2d. For that the said master hath in, and by his said report, certified that he was of opinion that the order was passed by the Ordinary of Bartow county, bearing date on the — day of May, 1876, which order allowed said John A. Erwin's resignation as one of the administrators on said estate of Lewis Tumlin, deceased, and discharged him from his trust as administrator, and

relieved his securities from all further liability, was not effectual as a discharge of the sureties on the bond given by said Gray and Erwin jointly, because the said sureties had presented no petition to said court of Ordinary praying from discharge from said bond, and on this point further certifying, that he was of the opinion that the discharge of Erwin by the Court of Ordinary did not, in legal effect, discharge the sureties on the bond of said Erwin and Gray as joint administrators, but that they remained bound therein as the sureties of said Gray, as sole administrator, whereas, in fact, and as a question of law, the said special master should have found as to the two foregoing exceptions: 1. That the discharge of John A. Erwin, as co-administrator, upon his resignation, discharged him as surety for his co-administrator; and 2. That the legal effect of his said discharge discharged all the sureties on said joint bond given by said John A. Erwin and F. P. Gray, as administrators on said estate of Lewis Tumlin, deceased, without any petition or application on their part to said court of Ordinary, or by any one else for them. See pages 11, 12, 13; also 23, 24 and 25 of said special master's report, to which reference is made.

Exception 3d: For that the said master hath in and by his report, certified that at the May term, 1876, of the said court of Ordinary in and for the county of Bartow, said court of Ordinary granted the petition of John A. Erwin to resign his administratorship, and by the same order appointed Frank P. Gray sole administrator, and required him to give new bond and security as such, and further ordering that the said John A. Erwin, after settlement with said Frank P. Gray, as his successor, together with his securities, be discharged from all liability for any mismanagement of said estate in the future, but not for any past liability of said John A. Erwin as administrator, and has also certified, that the order of said Ordinary per-

mitting the said John A. Erwin to resign, and appointing said F. P. Gray sole administrator, was appealed from and the case carried to the Superior Court of Bartow county, and then, on August 4th, 1876, affirmed by verdict of a jury ; and, notwithstanding these recitals by the said special master, he has not found and certified that the said John A. Erwin, as administrator, together with his sureties, were discharged, whereas he should have certified that the court of Ordinary of Bartow county was a court of original, general and exclusive jurisdiction of all matters pertaining to the administration of estates, and that its orders on this subject were conclusive, until reversed by appeal or other legal method, and should also have found that, in accordance with the terms of said order, so granted by said court of Ordinary, said John A. Erwin was discharged from his trust as administrator on said estate, as well as discharged as surety of his co-administrator, F. P. Gray, together with all the sureties on said bond." See pages 11, 12 and 13 of said special master's report : also pages 23, 24 and 25 of said report, to which reference is made.

Exception 4th. For that the said special master hath in, and by his said report, gone beyond the allegations and charges of the complainant's bill of complaint in this cause, to consider and report upon the liability of John A. Erwin, and the sureties upon the bond made by him, and F. P. Gray, as joint administrators on the said estate of said Lewis Tumlin, deceased; whereas he should have confined himself to the allegations and charges of said bill by said complainants, which did not intimate any liability against the said John A. Erwin or the sureties on the bond which the said Erwin signed as administrator, but, on the contrary, treats the resignation of said John A. Erwin, and the discharge of him and his sureties by the Ordinary of Bartow County, as the end of their liability.

These defendants refer to the original bill of complaint filed by the complainant in this cause, which constituted the pleadings on the part of complainant at the time of the reference of said cause to said special master.

Exception 5th. For that the said special master hath in and by his said report reduced the commission and fees allowed the administrators, John A. Erwin and F. P. Gray, for the division of land among the heirs, which was three per cent on the value of the land so distributed, and which commission and fees amounted to $3,433.68, to the sum of $500.00, holding that the order of the Ordinary of Bartow county making this allowance to said administrators was not conclusive, and that said allowance was not sustained by the evidence submitted to him; whereas said special master should have held that the said order, making said allowance, was conclusive on the parties interested, and that the evidence sustained said allowance as reasonable and not excessive. See pages of evidence referred to in master's report on this subject, which these defendants insist sustains the exceptions and shows that said allowance to said administrators was reasonable and just compensation allowed for the services rendered. See pages 26 and 27 of special master's report, to which defendants pray leave of reference.

T. W. MILNER,
MYNATT & HOWELL,
Solicitors for Veach *et al.*

Filed in Clerk's office, October 11, 1883.

SECOND REPORT OF MASTER.

The case was again referred to the master and he made the following report :

(See printed record, p. 107 and 108.)

Special Master's report over-ruling exceptions filed by sureties on joint bond of Gray and Erwin, filed in Clerk's office October 4th, 1884, A. E. Buck, Clerk.

These defendants except to the former report of the

special master in this case, and say said report was incorrect and wrong in holding John A. Erwin still liable as surety to Gray on said joint bond, although he had been discharged as co-administrator.

Also, in holding that the dischargeof said J. A. Erwin as co-administrator, and the order of the court of Ordinary of Bartow county discharging said Erwin and purporting to discharge the sureties on said bond, did not, in fact, discharge said sureties.

Also, that said report was wrong in not allowing to Gray and Erwin $3,433.68 as commissions for the division of the real estate of said Tumlin's estate among his heirs, and in allowing only the sum of $500 for the same.

These are in substance said exceptions.

See the pleadings for the exceptions in full.

On the question of commissions for dividing said lands, no additional evidence has been introduced in support of said exceptions, but reliance is had alone on the evidence which accompanies said original report; and after hearing argument, and duly considering and weighing said evidence, the special master sees no reason for sustaining said exception, and therefore reports that said exception is not sustained, but overruled.

In regard to said other exceptions, said sureties have introduced a certified copy of the record of the proceedings in the court of Ordinary of Bartow county, relating to the discharge of J. A. Erwin, as co-administrator of F. P. Gray, and of the proceedings of the Superior Court of Bartow county in the same case, on appeal from the said court of Ordinary. This copy record is in evidence, and, as such, accompanies this report. This record shows the same facts as are set forth on pages 10 to 13 of the original report of special master, and which is excepted to. Said record further shows a judgment in Bartow Supe-

rior Court in said case, dated February 16th, 1884, *nunc pro tunc*, in said appeal case, in favor of John A. Erwin on the issues made in the above case, and that his resignation be allowed. The record, however, does not show that the sureties on said bond, or any one in their behalf, ever instituted proceedings to be relieved from said bond, and it does not show any express proceedings by J. A. Erwin, himself, to be relieved from his legal position of surety to said Gray.

In the opinion of the special master, the question stands substantially as it did before, as to these sureties, and the question is now, and was before: Did the release or discharge of Erwin, as co-administrator with Gray, discharge the sureties on said bond?

After hearing elaborate and learned arguments on both sides of this question, the special master finds and reports that said exceptions are not well taken, and that said sureties were not discharged by Erwin's discharge as administrator. See items 39 and 40 of the original report, pages 23 to 26.

All which is respectfully submitted.

E. V. BROYLES, Special Master.

EXCEPTIONS TO SECOND REPORT.

The following exceptions of appellants in addition to those already quoted above were made to said second report:

Exception 1st. For that the said master hath, in his second general report, certified that Frank P. Gray and John A. Erwin, administrators, did not make and file with the court of Ordinary of Bartow county, Georgia, their first return in the manner required by law; in this, that they failed to account for all receipts and expenditures by them as administrators in said return, and that said master, by his said report, hath held that on account of such

neglect on the part of said administrators, that there should be allowed to them no commissions, and that all commissions, heretofore allowed them in his former report, be forfeited and disallowed, whereas said special master should have held and reported, that said Frank P. Gray and John A. Erwin, administrators, were entitled to the commissions claimed by them in their said first return, and should have allowed them credit on the account stated by him in his said report, for all of the commissions so claimed by them. The evidence submitted to said special master, and reported by him, does not require a forfeiture of such commissions; neither does the statute require such forfeiture. See first page of second general report of master, and 1, 2, 3 and 4 in his report, in the exceptions filed to former report by complainants, with the evidence therein referred to.

Exception 2d. For that said special master hath erred in his said report in holding and reporting, that the discharge of J. G. B. Erwin, H. C. Erwin and L. R. Ramsour, because their names had been improperly signed to the joint bond of Gray and Erwin, administrators, by their attorney in fact, did not discharge their co-sureties on said bond, whereas the evidence submitted to and reported by said master, hereinafter referred to, shows that the court of Ordinary, in having said joint bond executed in his presence, as required by law, knew that the attorney in fact of the sureties above mentioned had no authority to sign such bond, and in taking their signatures to such bond the co-sureties were mislead, and their liability increased above that which appeared in the face of the bond, and said master should have held that they were thereby discharged. See special report of master on liability of sureties on Gray and Erwin bond, page ——. See evidence of J. J. Howard, J. A. Howard, J.

A. Erwin, W. T. Wofford, J. M. Veach, and others, on this subject.

Exception 3d. For that the said special master in his supplemental report, endorsed "overruling exceptions," hath transcended the powers of a master in chancery, in undertaking to overrule exceptions to his original report, and in undertaking to pass upon and decide questions of law; also in holding in his said supplemental report, that the judgement of the Superior Court of the county of Bartow, *nunc pro tunc*, upon the verdict rendered upon the appeal from the court of Ordinary for said county, on the petition of John A. Erwin for leave to resign as one of the administrators on the estate of Lewis Tumlin, deceased, did not present an adjudication of all matters pertaining to the resignation of said Erwin, and the sureties upon his bond as administrator, which adjudication is final and conclusive of the question of the resignation of said Erwin and his discharge, and the discharge of all the sureties on the administration bond executed by said Gray and Erwin, and said special master erred in not so holding.

MYNATT & HOWELL,
THOMAS W. MILNER,
Solicitors for Veach *et al.*

Filed in office, October 29th, 1884.

DECREE.

On the 22d day of January, 1885, the Circuit Court pronounced a decree in the cause, upon the final hearing, overruling all the exceptions of appellants, as well as all the exceptions of other parties to the report of the master, and affirming the report of the master in all things. Said decree then proceeds to adjudge against the said Frank P. Gray, and the several defendant's sureties upon

he several bonds made, for the sum of $45,836.30, principal, and $1,276.45, interest, in favor of the heirs and creditors of the estate of Lewis Tumlin, deceased.

The appellants are held liable by said decree for the whole amount of said sum with its interest. The amount of the default of Frank P. Gray and John A. Erwin, or rather the amount found due from them up to the time of the resignation of John A. Erwin, to-wit, $8,414.56, is charged to the makers of the joint bond and their sureties, who are made defendants. The amount found due from Frank P. Gray, between the resignation of John A. Erwin and the making of the second bond by F. P. Gray, to-wit, $—— is charged to appellants and all the sureties on the first bond of Frank P. Gray, as sole administrator. The amount found due by the master against F. P. Gray as sole administrator, by reason of his defaults after the execution of the second bond, and up to the time of the cancellation thereof and the making of the new bond, to-wit, $———, is charged to appellants and all the sureties on the second bond. All the balance of defaults found against F. P. Gray, and the sureties on his last bond, is likewise charged to appellants, jointly with the other sureties on the last bond. Appellants did not object to the report of the master finding them liable for any amount due from the joint administration except as to the amount allowed for distributing the realty in kind. They excepted to the report of the master, in not allowing to the joint administration the amount found by the Ordinary, and adjudged to the joint administration for a distribution of the certain property of the deceased among the heirs in kind, to-wit: $———.

On the 21st day of January, 1885, after the case had been tried, but before the decree had been signed, the Circuit Court passed an order allowing Mrs. Cora M. Gray and John S. Leake, citizens of Georgia, to file amendments

to their answers so as to claim an interest in the amount of the decree pronounced in this cause. This matter is assigned as error by appellants.

The exceptions taken by the appellants to the master's report have been copied above. In addition to the errors assigned by reason of overruling these exceptions, the appellants also insist upon the following assignments of error. (Printed record, page 217.) It was error to charge your petitioners (appellants) with any default, indebtedness or waste, of F. P. Gray, as administrator of Lewis Tumlin, deceased, after the resignation of his co-administrator, John A. Erwin. It was error to disallow the administrators, Erwin and Gray, the commissions allowed them by the ordinary of Bartow county for distribution of the estate in kind of said Lewis Tumlin, deceased. It was error to allow the amended answer of Cora M. Gray and John S. Leake, asserting their claim against Frank P. Gray, after the hearing and trial of the cause, also to allow and order that the cause abate as to William P. Wofford after the trial, he having died long anterior to the trial. The Circuit Court for the Northern District of Georgia, had no jurisdiction to render judgment, or pronounce a decree in favor of those of the defendants who are and were citizens of the State of Georgia, when said suit was begun, and have been ever since, against appellants who are and were also citizens of the State of Georgia, all which appears in the record, and that the judgment and decree in their favor is void for want of jurisdiction. See bill of complaint, printed record, page 1.

BRIEF OF ARGUMENT.

1. The condition of the bond is, that Frank P. Gray and John A. Erwin, shall well and truly administer, account for, pay over, etc. The undertaking on the part of the sureties is, that they shall jointly administer the estate. The following is a copy from the Code of Georgia, section 2149, as to the nature of the obligation of principal and surety: "The obligation of the surety is accessory to that of his principal, and if the latter from any cause becomes extinct, the former ceases, of course, even though, it be in judgment. If, however, the original contract of the principal, was invalid from a disabilty to contract, and the inability was known to the surety, he is still bound." Brown *vs.* Ayer & Bates, 24 Ga., 289. Brandt on Suretyship and Guaranty, section 98. It is needless to cite authorities to show that the release of one of two or more principals ordinarily discharges the sureties.

On page 60 of printed transcript, the special master states the reason why the sureties were not discharged by the order of the Ordinary, to be that Erwin's discharge was the act of the law and not the act of the creditors or heirs. He says, the Ordinary was not the real party in interest, and hence, he concludes, that Erwin's discharge did not have the effect to discharge the sureties. It is proper to state here again, that the report of the master was in all things affirmed by the chancellor.

The resignation of Erwin was no more the act of the law than is the release of one co-obligor by the creditors. The law acts to certain ends upon both transactions. In the case of the release of the co-obligor, it it is the act of the creditor. In the case of the resignation of the administrator, it is the act of the obligor together with the Ordinary. The release by the creditor is disposed of by the law of Georgia in this language—Code, section 2862:

"A release sometimes results as an operation of law, as when a creditor releases another who is bound jointly with or primarily to the debtor, or accepts from the debtor a higher security for the same debt, not intended to be collateral thereto."

The resignation of the administrator is provided for by the law of Georgia in this language—Code, section 2610: "Any administrator who, from age or infirmity, removal from the country, or for any other cause, desires to resign his trust, may petition the Ordinary, stating the reasons, and the name of a suitable person qualified and entitled to and willing to accept the trust; whereupon the Ordinary shall cite such person, and the next of kin of the intestate, to appear and show cause why the order should not be granted. If no good cause be shown, and the Ordinary is satisfied that the interest of the estate will not suffer, the resignation shall be allowed, and the administrator shall be discharged from his trust whenever he has fairly settled his accounts with his successor, and filed with the Ordinary the receipt in full of such successor. Minors in interest shall be allowed five years from the time of their arrival at majority to examine into and open such settlement." Of course this statute is not made for the case of a sole administrator only. One of two may resign. He suggests his successor. The bond is provided for by the Code in this language, section 2505: "Every administrator upon his qualification shall give bond, with good and sufficient security, to be judged of by the Ordinary, in a sum equal to double the amount of the estate to be administered; such bond shall be payable to the Ordinary for the benefit of all concerned, and shall be attested by him or his deputy, and shall be conditioned for the faithful discharge of his duty as such aministrator, as required by law. A substantial compliance with these requisitions for the bond shall be deemed sufficient,

and no administrator's bond shall be declared invalid by reason of any variation therefrom, as to payee, amount, or condition, where the manifest intention was to give bond as administrator, and a breach of his duty as such has been proved." Also, the following section 2510: "If two or more administrators unite in a common bond, all the sureties are bound for the acts of each administrator, and the administrators themselves are mutual sureties for each other's conduct."

The statute is silent as to the succession. This is left in the discretion of the Ordinary, under section 2610 *supra*.

There are three ways in which vacancies may occur in administrations:

1st. By death.

2d. By removal.

3d. By resignation.

By death, Code, section 2499: "If administration has been granted to more than one, upon the death of either, the right of administration survives to the other."

By removal, Code, section 2511: "Whenever the Ordinary knows, or is informed by any person having an interest in the estate, that the administrator wastes, or in any manner mismanages the estate, or that he or his sureties are likely to become insolvent, or that he refuses or fails to make returns as required by law, or that for any reason he is unfit for the trust reposed in him, he shall cite such administrator to answer such charge at some regular term of the court, and upon the hearing of his return the Ordinary may, in his discretion, revoke the letters of administration, or require additional security, or pass such other order as, in his judgment, is expedient under the circumstances of each case." Also section 2512, as follows: "In all cases of removal of an administrator for any cause, the sureties on his bond are liable for his acts in connection with his trust, up to the time of his settlement

with an administration *de bonis non*, or the distributees of the estate." Section 2514 is as follows: "If there are more administrators than one, and complaint is made against one only, and his letters are revoked, the entire trust remains in the hands of the other, and with him as to an administrator *de bonis non*, the removed co-administrator must account."

The section as to resignation is copied above. It will be observed, that in the case of the death of one adminiinistrator, it is not the administration, but the right of administration, that survives to the other. This right might be denied him in the discretion of the Ordinary, as in the case of citation in the beginning, under section 2500 of the Code: "Administration may be granted to other persons than him in whose name the citation issues, and without a new citation being published." So in case of resignation. The suggestion of the resigning administrator does not control the Ordinary. It is only a nomination to be acted upon by him. In the case of a defaulting administrator, the broadest possible discretion is vested in the Ordinary under section 2511, but no broader than is given him in the general powers conferred upon him by the Code of Georgia, Code, section 331, which is as follows: "Courts of Ordinary have authority to exercise original, exclusive and general jurisdiction of the following subjects-matter:

1. Probate of wills.

2. Granting of letters testamentary of adminisiration and the repeal or revocation of the same.

3. Of all controversies in relation to the right of executorship or administration. * * * * *

4. The sale and disposition of the real property belonging to, and the distribution of, deceased persons' estates. * * * *.

8. The discharge of the former and the requiring of new surety from administrators and guardians. * * *

9. The issuing commissions of lunacy in conformity to the law.

10. Of all such other matters and things as appertain or relate to estates of deceased persons, and to idiots, lunatics and insane persons.

11. Of all other matters as may be conferred on them by the Constitution and laws. The omitted parts are as to lunatics, etc.

The liability of the surety is *stricti juris*. Code of Georgia, §2150: "The contract is one of law, and his liability wtll not be extended by implication or interpretation." This law is applicable to all sureties, whether of trustees or not. If the sureties on the bond of Gray and Erwin were liable for the acts of Gray, after the resignation of Erwin, then it must be by implication, for the statute is silent. When the act of the law discharges the principal, as in the case of the bankruptcy of the principal, there is no release of the surety for liability already incurred. This principle, however, could not be held to apply to guaranties of future conduct. Bankruptcy makes a change in the relation of parties, and they may protect themselves as to the future, just as the Ordinary protected these appellants when Erwin resigned.

It is true that it has been held that, in the case of the removal of a co-administrator by death, resignation or otherwise, the sureties are bound for the conduct of the remaining administrator. State against Rucker, 59 Mo., 17; Hocker *vs.* Woods, Ex'r; 33 Penn. St., 466. But these cases are put upon the express provisions of the statutes of the States of Missouri and Pennsylvania. So it was also in King *vs.* The Central Bk., 6 Ga. R., 257, 260. In the case at bar, there was nothing to put the sureties upon notice that they were to be bound; not only this, but they were discharged by the Ordinary.

The report of the master, which is adopted by the court below, seems to proceed upon the idea, that the sureties could only be discharged pursuant to an application made by them for that purpose. See printed record, page 59. That this is not the only method of discharge is clearly shown by the case of McGee & Scott *vs.* Scott, guardian, 15 Ga., 74. The case of Dupont *vs.* Mayo *et al.*, 56 Ga., 304, was relied upon to support the position of the master. It is true that was the case of discharge by petition, but as will be seen, that case only makes the question of the method of procedure in the case of such discharge. Besides, the case of Woods *vs.* Mason, 1st Kelly, 84, announces directly the contrary of the conclusion reached by the court in the case in the 56th Ga. But, as stated above, the case in the 56th makes only the question of the sufficiency of the proceeding. That the court may discharge the surety without any application, is held in Crawford *vs.* Penn, 1st Swan, Tenn. Reports. Hammer *vs.* Mason, 24th Ala., 480.

Upon the question of the jurisdiction of the court of Ordinary in Georgia, we desire to call attention to some of the decisions of our Supreme Court. In Davie *vs.* McDaniel, 47th Ga., 195, Judge Montgomery, in delivering the opinion of the Court, uses this language:

1st. "That courts of Ordinary are courts of original, exclusive and general jurisdiction of the sale and disposition of the real property belonging to, and the distribution of, deceased person's estates is provided in *totidem verbis* by the Code, section 366. And to the same effect is the Act of 1856 (Acts 1855-6, page 147), which first made them courts of general jurisdiction. That act, it may be remarked, was passed in response to a call for just such an act by Judge Lumpkin in Tucker *vs.* Harris, 13th Ga., 1, and to remedy the evils found to result from the decisions of this Court, holding the court of Ordinary

a court of limited jurisdiction. That act declares, "that all courts of law and equity, in this State, when determining on any judgment, or order, which the several courts of Ordinary in this State have passed or made, or may hereafter pass or make, as to testate and intestate estates, shall hold said courts of Ordinary to be courts of general jurisdiction, and not courts of limited jurisdiction." The Code nowhere repeals this act in terms, nor is it obvious to my mind wherein any of its provisions are inconsistent with it."

2d. Where the Court of Ordinary has passed an order in reference to a subject matter over which it has jurisdiction, this Court has repeatedly held, that it will not go behind the judgment to see if everything was done in accordance with law, but will presume it was; especially will the presumption be made in favor of the judgment when attacked collaterally, as in the case at bar." Patterson *vs.* Leonard, 50 Ga., 231; read at page 236 of opinion. In the case of Barnes *vs.* Underwood, 54 Ga., 87, Chief Justice Warner, who dissented in the case of Davie *vs.* McDaniel *supra*, on page 93, uses this language: "But the majority of this Court held, in Davie *vs.* McDaniel, that the judgments of the courts of Ordinary in this State, in matters connected with wills and the administration of estates, were judgments of courts of general jurisdiction, and that the necessary jurisdictional facts need not to appear on the face of their proceedings." Such is, therefore, now the settled rule of law in this State in relation to that question. See also Butts *vs.* Pew, 54 Ga., 465; read at page 467. Fant *vs.* Wigfall, 65 Ga., 412; read head-note and opinion of the Court on page 414. Maybin *vs.* Knighton, 67 Ga., 103; read head-note and at bottom of page 105. See also Baber and wife *vs.* Woods, administrator, 39 Ga., 643.

After Gray had been appointed sole administrator, two

of his sureties on the new bond moved to be discharged, under the following sections of the Code—2509 and 1817, printed transcript 55:

Section 2509. "The provisions herein before made in case the surety on a guardian's bond dies, or becomes insolvent, or removes from the State, or from other causes becomes insufficient, or in case the surety desires to be relieved as surety, shall be applicable to sureties on administrator's bonds in the same manner, and under the same conditions as if they were therein named."

Section 1817. "The surety of any guardian, on his bond, or if dead his representative, may at any time make complaint to the Ordinary of any misconduct of his principal in the discharge of his trust, or for any other reason show his desire to be relieved as surety. Thereupon the Ordinary shall cite the guardian to appear at a regular term of the court, and show cause why such surety shall not be discharged; and upon hearing the parties and their evidence, the Ordinary may at his discretion pass an order discharging such surety from all future liability, and requiring such guardian to give new and sufficient security, or be discharged from his trust, such new sureties shall be liable for past as well as future waste, or misconduct of the guardian. And such discharged surety shall be relieved only from the time the new security shall be given. If new security is not given, and the guardian's trust is revoked, the discharged surety shall be bound for true accounting of such guardian with the new guardian, or his ward, if no other guardian is appointed. The death of a surety shall be a sufficient ground for his discharge from future liability on application of his representative, and the granting of the order. In all cases where letters of guardianship are revoked, the sureties on the bond are liable for all the acts of the guardian in relation to his trust up to the time of his settlement with the new

guardian or his ward." The master held that this relieved all the sureties on that bond for future liabilities. Printed transcript 66. This is an open question in Georgia, so stated in DuPont *vs.* Mayo, 56 Ga. 304, at page 306. But if the discharge of the Woffords and Rich, on their application discharged all the other sureties, as held by the master, it would for the same reason discharge the appellants on the joint bond, if they had not already been discharged, as we have argued.

Again, there was an appeal from the order allowing the resignation of Erwin, and discharging the sureties, to the Superior Court. Printed transcript 54. The master says there was no record evidence of a judgment on the verdict affirming the appeal. This question was settled by judgment *nunc pro tunc*, pending this litigation in the court below. Printed transcript 107 and 186. The appeal took up the whole record for review, Code, section 3627: "An appeal to the Superior Court is a *de novo* investigation. It brings up the whole record from the court below, and all competent evidence is admissible on the trial thereof, whether adduced on a former trial or not, either party is entitled to be heard on the whole merits of the case." Howard *vs.* Morrill *et al.*, 42 Ga., 397; Abrams *vs.* Lang & Sons, 60 Ga., at page 221. Thus the jurisdiction of the Ordinary to discharge these appellants, as sureties, was determined to be proper by the Superior Court of Bartow county. The question of jurisdiction was before the court and passed upon. See Tant *vs.* Wigfall *supra*, at page 414.

Judgment of a court of competent jurisdiction cannot be collaterally attacked. Code, 3593. In the case of Bryan *vs.* Walton, 14 Ga., 186, h. n., 11, it is decided that the order confering the appointment of administrator cannot be collaterally impeached. So, also, in the case of Jacobs *vs.* Pou, adm'r, 18 Ga., 346, it is held that a judgment of

the Ordinary dismissing the administrator cannot be collaterally attacked except in Superior Court for fraud.

The finding by the master, and the decree affirming that finding, is in favor of citizens of Georgia, in a controversy with citizens of Georgia, except as to Mrs. Ada S. Rice, the complainant, who is a citizen of Tennessee. Printed transcript 1, *ibid* 49, 197, 200 *et seq.* We insist that the Court had no jurisdiction to render a judgment in favor of the citizens of Georgia against citizens of Georgia in a controversy between them. U. S. Constitution, Art. 3, Sec. 2; Hook *vs.* Payne, 14 Wallace, 255.

2. The item of three thousand four hundred and thirty-three dollars and sixty-eight cents ($3,433.68), for dividing the land in kind, allowed by the Ordinary to Erwin and Gray, was disallowed by the master, as shown by his report on page 60 of printed transcript. The master puts this upon the ground that it was extra compensation. This is not the meaning of the statute, as will be seen by the following section:

Section 2592. "No commission shall be paid to any administrator or executor for delivering over of any property in kind, but the Ordinary may allow reasonable compensation for such service, not exceeding three per cent. on the appraised value. If, however, land is worked by any trustee, for the benefit of the parties in interest, the Ordinary may, in his discretion, allow to such trustee additional compensation for such services, in no case exceeding ten per cent of the annual income of the property so managed."

Section 2593 provides for traveling expenses of administrators and calls all allowances above "actual disbursements," "such additional compensation."

Section 2594—*Extra compensation.* "In other cases of extraordinary services, extra compensation may be allowed by the Ordinary. But in no case is the allowance

of extra compensation by the Ordinary conclusive upon the parties in interest."

We think this was not extra compensation within the meaning of the statute, and that the order of the Ordinary allowing it was conclusive.

But it was claimed below that a failure to make full and honest returns each year lost all commissions for all the years of the administration.

In 1847, the Supreme Court of Georgia did hold that under the Act of 1792, declaring, "if any executor or administrator shall neglect to render such annual accounts he shall not be entitled to any commissions for his trouble in the management of the estate," one default made him lose all commissions. Fall *vs.* Simmons *et al*, 6 Ga., 274. They said the Supreme Court of South Carolina had decided the reverse upon "a precisely similar law."

That ruling by the Supreme Court of Georgia was reiterated in 1850, in Kennan & Carter *vs.* Hall *et al.*, 8 Ga. R., 417. In both the words of the statute controlled the Court. And in both cases the failure to make annual returns was called gross neglect. In the first, returns were made in 1829, then 1834 and then 1845. In the latter, Kennan & Carter, jointly qualified in 1836, made a joint return in 1838, then none until 1846, 1847 and 1848, and these last three were made by Carter only, and the last after the suit was begun.

To correct that decision the General Assembly of Georgia passed the following Act, viz:

"An Act to regulate the returns of executors, administrators and guardians. Approved February 22, 1850.

"WHEREAS, By the Act of 1792, executors and administrators are required to make their annual returns to the courts of Ordinary, by the tenth day of January in each year, embracing all transactions of the estate they represent, up to the thirty-first of December immediately

preceding, and whereas, by other statutes a different time seems to be fixed, within which said returns shall be made, and a difference existing in different counties, in reference to the time of making said returns, and the Supreme Court having determined that an executor or administrator failing to make his annual returns, shall forfeit his commission on the whole estate, in order to settle said practice and save executors and administrators from loss of commissions, when acting without fault:

SECTION 1. Be it enacted, That executors, administrators and guardians shall be permitted to make their annual returns required of them, by the first Monday in July of each and every year, any law to the contrary notwithstanding.

SEC. 2. When from Providential cause, any such trustees shall fail to make returns by the time specified, the Superior Court, when sitting for ordinary purposes, may by special order on their minutes, save them from all penalty of forfeitures of commissions on account of failing to make said returns within said time.

SEC. 3. If any executor, administrator or guardian shall fail to make a return within the time required by law, he shall not lose the commissions on any returns made in due time." Cobb's New Digest.

Laws of Georgia, 1850, page 340. The Code, §2596, makes the failure "to make annual returns as hereinbefore required forfeit all commissions during the year within which no return is made, unless the Ordinary, upon cause shown, shall, by special order on the minutes, relieve them from their forfeiture." For these orders in this case see the statement of facts *ante*.

The Act of 1764 allowed two and a half per cent. on the amount received, and on the amount paid out, but none on property delivered. But it allowed a suit in the Superior Court for more compensation for services other than

receiving and paying out money. Cobb's New Digest, 304, 305, §§11 and 12. The Code of Georgia, §2592, allows the Ordinary to fix fees for distribution in kind "not exceeding three per cent. on the appraised value." The Ordinary's order is final.

3. The defendants, Cora M. Gray and John S. Leake, filed amended answers, or rather petitions as amended answers, after the case was tried, asking an interest in the decree of the court. These amendments were allowed. Printed record 192, 193, 194, 195 and 196. Said Mrs. Gray and John S. Leake were by the decree allowed their interest in the same. Printed record, 201. Equity rule 60 provides for the manner of amending answers, and these amendments came too late. Besides, we think the Court had no jurisdiction to place them virtually in the attitude of complainants in the bill, being, as they were, citizens of the State of Georgia.

P. L. Mynatt,
N. J. Hammond,
Counsel for Appellants.

FILED,
MAR 15 1889
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 208.

JAMES M. VEACH ET AL. *vs.* ADA RICE ET AL.

Appeal from the Circuit Court of the United States for the Northern District of Georgia.

ADDITIONAL BRIEF FOR APPELLANTS.

P. L. MYNATT &
N. J. HAMMOND,
Counsel for Appellants.

JUDD & DETWEILER, PRINTERS.

Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 208.

JAMES M. VEACH ET AL. *vs.* ADA RICE ET AL.

Appeal from the Circuit Court of the United States for the Northern District of Georgia.

ADDITIONAL BRIEF FOR APPELLANTS.

1st. As to the allowance of the 3 per cent. for dividing the realty in 1876.

The only failures to perform duty before the resignation of Erwin charged in the bill is that wild lands amounting to two thousand acres were left out of the inventory of wild lands, and that in describing choses in action they did not show which bore interest at a higher rate than the conventional seven per cent. (Printed Record, 4.) The omission of the wild lands is explained at page 51 under "inventory" and fully excused by the master, under "Wild Lands," at

page 59; and to that no exceptions were filed. The other alleged omission is not mentioned except at page 4, *ante*. All delays in making returns were shown to be legal and to the satisfaction of the master and not excepted to (page 89). The attorney's fees which Gray is charged to have illegally taken amount to $289 and were taken in 1878 (?) (See page 64 of printed record; see the master's report on the first return, printed record, 65, 66.) Even at common law these things would not forfeit that three per cent. for the work of 1876.

1st. We will examine the cases cited for appellees:

Gray *vs.* Conyer's Adm'r, 70 Ga., 349, was as to fees of an attorney-at-law for collecting money where he had to be ruled to collect it from him. (*Ib.*, 350, 5 *a.*) That was controlled by common-law principles.

In Eppinger, Russell & Co. *vs.* Canepa, 20 Fla. R., 264 (10), there was no inventory of personalty filed, a neglect to make annual returns, and he "failed generally to discharge his duty." (*Ib.*, 289.) It cited Shepherd's Heirs *vs.* Shepherd's Adm'r, 19 Fla., pp. 331 and 332. Their statute "allowed a fair and just compensation for their services" and a percentage on sales of deceased's property.

In the Succession of Joseph Touzannee, 36 La. An., 420, there were no assets but money, and it was "extorted from him through repeated orders of court and under pressure of a rule for contempt." No statute is there cited.

Estate of Unruh, deceased, 13 Phila. R., 337, was where "accountant held the adversary positions of surviving partner of the decedent and administrator of his estate," and yet "made no effort to close the business," * * * "traded

for his own benefit upon the capital of the intestate, and hazarded that capital with such effect that in December, 1879, he failed and made an assignment for the benefit of creditors," &c. "No account of his administration was exhibited until after the service of a citation and a subsequent peremptory order of court." (*Ib.*, 338.) This was called bad faith, and therefore compensation was refused.

Milligan's Appeal, 97 Pa. St. R., 525, showed the party "converting her testatrix's property to her own use and making use of trust funds for her own benefit." No statute cited.

Walker *vs.* Walker, 9 Wall. R., 743, was the case of a trustee from Massachusetts, where "he literally did nothing towards executing his trust, but, on the contrary, was guilty of grossest abuses concerning it," and this Court said that to allow him compensation "would be a departure from correct principle." (*Ib.*, 757.) Barney *vs.* Saunders, 16 Howard, 542, was simply an allowance of compound interest against a trustee, where the trust "had been grossly and willfully neglected." (*Ib.*, 542.)

Thus all of these cases cited for appellees stood upon general principles and without such statutes as we have cited from Georgia, making a change in the law for that State. We remark in passing that this Court, in Walker *vs.* Walker, *supra*, said that the Federal courts should in these cases enforce the same rules "that the local courts would do in favor of their own citizens." 9 Wall., 744, (4.)

The heirs asked for this division (Printed Record, 52), and knew the law allowed compensation therefor. Nor was it "extra." It was regular compensation. Counsel for appellees cite § 1835 of Ga. Code of 1882, that where a guardian is

removed for waste or gross mismanagement" he forfeits all commissions. But here is no removal, and that rule does not apply to administrators, since the act of 1850, cited in our brief. Section 2514, says, on complaint made and consequent *revocation* of letters of administration of one of several administrators, "the entire trust remains in the hands of the other, and with him, as an administrator *de bonis non*, the removed co-administrator must account." But nothing is said as to his loss of compensation.

2nd. *As to the effect of Erwin's resignation.* § 2610 is made up not solely of the act of 1854, but also of a later act.

The act of 1854 allowed resignations for three specified reasons, "and it appearing that it would be to the interest of those concerned to allow the same to be done." And the ordinary was authorized "to make such further order in relation to allowing commissions and settling up with his successor as may be right and proper," provided notice of application be published for two months. (Acts 1853–4, 6.)

In 1857 another act was passed allowing resignations, "provided he or she can get some suitable person to accept his or her office who shall be acceptable to the ordinary when such application is made, such successor in office to comply with existing laws as to giving bond, taking oath, &c." Section second of that act requires the resigning administrator to deliver property and settle with his successor, and then, but not otherwise, to be discharged. Section third forbade the charging of any compensation for turning over and paying to successor. Section fifth was "that in all cases where an executor, executrix, administrator, administratrix, or guardian resigns his or her trust, his or his successor

shall give bond in double the amount of the estate to be turned over by the executor, executrix, administratrix, or guardian resigning his or her trust, the securities to be judged of by the Ordinary." (See acts of 1857, pages 160–161.)

Those two statutes of 1854 and 1857 together make § 2610 of the code cited by counsel for appellees.

At common law there was survivorship when one of several administrators died, because it was an "office." (4 Bacon's Abridg. Ex'rs & Adm'rs, G., 69.) The case there cited, Eyre *vs.* Countess of Shaftesbury, 2 Pierre Williams, 121, put that on the ground of "authority coupled with an interest," citing 1 Inst., 112–113.

The Georgia Code, § 2499, makes "the right of administration" survive.

But here nobody died. Erwin resigned under a statute allowing such resignations, and the sole question is the effect of that on his sureties.

That § 2610, interpreted in the light of that act of 1857 and by its words, made Gray the "successor" with whom Erwin must account and settle. The Ordinary made Gray comply with existing law as to giving bond, &c.

A strong case in point is that of JJ. Infr. Ct. *vs.* Spelman, Sparks & Co., 6 Ga. R., cited by counsel for appellees. The act of 1812 allowed an administrator to remove his place of returns if he changed his residence upon "having given new bond and security, as the law directs, for the performance of his duty." The Supreme Court of Georgia held that the requirement of a new bond released the securities on the old bond (though the law was silent on that point) from liability for acts after the date of the new bond.

(6 Ga. R., 438, 439, 440.) They said no judgment of discharge of the surety was necessary; that it followed as matter of law. Ours is a stronger case than that.

Counsel for appellees say that the three minors were not properly cited, and that therefore the discharge is void as to them under § 1821 of Georgia's Code. No such question was made before the master or decided by the court below. How could it be made in a Federal court between citizens of the same State? It was made in the supreme court of Bartow county, Ga., to prevent the order for judgment *nunc pro tunc*, but was ineffectual. (See Printed Record, page 182.)

If good at all, that would apply only to the three minors. When they became of age does not appear. The amended bill says one of them, G. H. Tumlin, "objected to said resignation," * * * "and all the other caveators heard had appealed from that decision" except Rice and his wife. (See Printed Record, 37.)

Were the interests of these minors and of their guardians "adverse" in this matter of resignation?

HOW PARTIES MAY BE CITED IN GEORGIA.

"*Of the Practice in the Court of Ordinary.*"

"Every application made to the ordinary for the granting of *any* order shall be by petition in writing, stating the ground of such application and the order sought. If notice of such application, other than by published citation, is necessary under the law or in the judgment of the Ordinary," he shall cause a copy to be served on the parties to be notified. (Code, § 4114.)

Section X, Code 1882: "Of letters of dismission and resig-

nation." Section 2606, for dismission: "Upon such petition a citation shall issue requiring all persons concerned to show cause against the granting of the discharge. Such citation shall be published in the Gazette for three months." Immediately following is section 2610, which allows resignation, and requires that "the Ordinary shall cite such person" (the offered successor) and the next of kin of the intestate to appear and show cause why the order should not be granted."

3d. If they ought to have been served personally, both as to the three per cent. and the judgment as to discharge, they are now estopped by delay to complain sooner.

We cite analogous cases of estoppel by delay. For instance, minority stockholders cannot complain of acts *ultra vires* even, unless they do so promptly.

Cook on Stockholders, &c., § 686.
Taylor *vs.* Railway Co., 4 Woods, 575.
Railway Co. *vs.* Railway Co., 3 De Gex, M. & G., 341.
Stewart *vs.* Transportation Co., 17 Minn., 372. (Gil., 348.)
Peabody *vs.* Flint, 88 Mass., 54. (3½ years.)
Gregory *vs.* Packett, 33 Beav., 595. (6 years.)
Ashunt's Appeal, 60 Pa. St. R., 290. (7 years.)
Dimpfell *vs.* R. R. Co., 110 U. S., 209. (3 years and 8 months.)
Alexander *vs.* Searcy, Supreme Ct. Ga., Jan'y, 1889. (So. E. Rep., 5 M'ch, '89.)

By that section, 2610, minors are allowed five years to open settlement, &c.

More than five years elapsed between that settlement and the filing of the bill.

The resignation was not secret or private. An issue was made upon the alleged grounds and decided in Erwin's favor (see Printed Record, pp. 34 and 37), and appealed from to Supreme Court, and then abandoned by the heirs.

P. L. MYNATT &
N. J. HAMMOND,
Counsel for Appellants.

Office Supreme Court U. S.
FILED
FEB 8 1887
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1886.

No. 810.

J. M. VEACH ET AL., APPELLANTS,

vs.

JAMES L. RICE AND WIFE, APPELLEES.

BRIEF OF COUNSEL FOR APPELLEES, RESPONDENTS.

Answer of Appellees to Motion of Appellants to Print Only Part of the Record.

The appellant filed several exceptions to the master's report, and in their application for appeal made several assignments of error.

In the present motion only one of these is alluded to, and it is not very fully or correctly stated.

One ground of error complained of is the forfeiture of commissions claimed by Gray and Erwin in their first return, amounting to $3,433.68.

This forfeiture was insisted on by counsel for the appellees, on the ground that said administrators did not render a true and just account on oath of their receipts and expen-

ditures for the preceding year, as required by Section 2525 Code of Georgia.

§ 2525. Annual returns: "On or before the regular term of the court, in July in each and every year, every administrator shall make a true and just account, upon oath, of his receipts and expenditures in behalf of the estate during the preceding year, together with a note or memorandum of any other fact necessary to the exhibition of the true condition of such estate."

And that in consequence of their failure to make this return as required they forfeited all claim to commissions.

Code, Sect. 2596.

§ 2596. Forfeiture of commissions: "Administrators and other trustees failing to make annual returns as hereinbefore required shall forfeit all commissions for transactions during the year within which no return is made, unless the Ordinary, upon cause shown, shall, by special order on the minutes, relieve them from this forfeiture."

Now, whether this return was such as required by law, just and true, depends upon evidence, and all the evidence bearing upon this point should be printed as part of the record.

And it was further insisted that the conduct of Gray throughout the administration was *malafide*.

That he failed to report and charge himself with moneys received by him belonging to said estate.

That he claimed false credits and filed fraudulent vouchers to sustain them.

That he employed lawyers to represent the estate under an agreement that they should divide the fees with him.

That he expended money to suppress testimony and to procure testimony which was fraudulent.

And that instead of applying funds that came to his hands to be administered to the payment of just claims against the estate he employed them for his own private uses and in speculative enterprises.

These are simply some of the specifications of his conduct as trustee; and we contend for the rule that a trustee guilty of such acts is not entitled to compensation for his services.

See Barney *vs.* Saunders, 16 H., 542.

And reference must be had to the evidence to see if these charges of bad faith, waste, and mismanagement are sustained or not.

The appellees claim that in the contract between Gray and Erwin, touching the latter's resignation of his trust, it was agreed that Gray, who had been the active administrator, should be entitled to claim all fees and commissions accruing to them during their joint administration, and we insist he could and did forfeit all claim by failing to obey the law and by his misconduct and bad faith.

If appellants will agree to insist only on the ground of error set out in this motion much of this record need not be printed, or, if they will admit the return in which the forfeited commissions are charged was not a just and true return, and admit that Gray was guilty of bad faith and misconduct, as hereinbefore charged, then a large part of this record need not be printed. Unless this is done we simply claim that all the evidence that bears upon any ground of error complained of be printed as the record of this cause.

W. K. MOORE,
Of Counsel for Appellees.

Office Supreme Court U. S.
FILED,
JAN 26 1889
JAMES H. MCKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 208.

JAMES M. VEACH ET AL., APPELLANTS,

vs.

ADA S. RICE ET AL.

Appeal from the Circuit Court of the United States for the Northern District of Georgia.

BRIEF OF W. K. MOORE FOR THE APPELLEES.

JUDD & DETWEILER, PRINTERS.

Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 208.

JAMES M. VEACH ET AL., APPELLANTS,

vs.

ADA S. RICE ET AL.

Appeal from the Circuit Court of the United States for the Northern District of Georgia.

BRIEF OF W. K. MOORE FOR THE APPELLEES.

On 12th July, 1881, James L. Rice and Ada S. Rice, his wife, filed their bill in the United States circuit court for the northern district of Georgia against Frank P. Gray, as administrator of the estate of Lewis Tumlin, of Bartow county, deceased, and against the appellants and others, as sureties, on a joint administration bond executed by John A. Erwin and Frank P. Gray, administrators, and against other sureties upon bonds afterwards executed by Gray as sole administrator of said estate, and also against the heirs of said estate, six in number, and with complainant, Ada S. Rice, making in all seven heirs and distributees also; against certain creditors of the estate.

The complainants were citizens of Tennessee; the defendants were citizens of Georgia.

The bill charges many acts of waste and mismanagement against Gray, administrator, specifically, and asked for an injunction restraining him from further proceedings in his administration.

Also asked for a receiver to take charge of the property and assets of said estate and for an account of his acts and doings as administrator of said estate and for a statement of the amounts paid by him to each of the heirs, and that complainants might have a decree for the distributive share of said estate against Frank P. Gray and the sureties on the five administration bonds given, the first by him and J. A. Erwin as a joint administration bond, the last four by Gray alone, and that the respective liabilities of said several securities might be ascertained and fixed.

It was charged in the bill and admitted that John A. Erwin, one of the joint administrators, was at the time of filing the bill a citizen of Tennessee. (Transcript, page 120.) The bill had also the usual prayer for general relief, and waived expressly any discovery on oath from defendants.

Four of the heirs file answers admitting receipts from administrators (pages 29 and 30 of Transcript).

Gray and his sureties file answers denying charges in bill, not on oath, but signed by their solicitors Oct. 3, 1881 (page 30).

The sureties on joint bond of Gray and Erwin file an additional answer Oct. 3, 1881 (page 34).

Defendants demur to bill Oct. 3, 1888 (pages 35 and 36).

Demurrer overruled March 14, 1882 (page 36).

Order of reference to special master, in its terms broad and comprehensive, March 20, 1882 (pages 36 and 37).

Amendment to bill by complainants charging that John A. Erwin was not only bound still as a surety of F. P. Gray, but that he was still one of the administrators of said estate, never having legally resigned, &c., May 19, 1883 (pages 37 and 38).

Answer of J. G. B. Erwin and Henry C. Erwin, denying the fact that they had ever signed or authorized the signing of the Gray and Erwin joint bond, Sept. 13, 1883 (pages 41 and 42).

Answer of H. C. Ramsaur, administrator, denying that his intestate signed the joint bond dated Oct. 4, 1883, (pages 43 and 44).

Answer of appellants insisting, among other things, that the Erwins and Ramsaur not being bound, that they also were released from liability, Nov. 24, 1883 (page 44 *et seq.*).

Replication filed (pages 47 and 48).

First report of special master (pages 49 to 69).

Order of recommittal to Special Master E. N. Broyles, with instructions (pages 80 and 81).

Second and final report of special master (pages 81 to 108).

Exceptions by appellants (pages 110 and 111).

Petition of John A. Erwin for leave to resign his trust, April 11, 1876 (page 121).

Citation, service, &c., and order of court of ordinary, (pages 122, 123, and 124).

Final order of court of ordinary, June 12, 1876 (page 124).

The proceedings and judgment of the court of ordinary on this resignation, the appellants insist, discharged them from all future liability as sureties. This is insisted on as the first ground of error and is presented in different forms under what are presented as exceptions 1st, 2d, and 3d, on page 214, and exception 3d of exceptions to second report of master, &c., and presents three questions for determination by this Court:

1st. Did John A. Erwin's resignation take effect and become valid?

2d. If it did were his sureties in consequence thereof by operation of law discharged from future liability?

3d. Was the order of the court of ordinary granted May 1, 1876 (pages 123 and 124) effectual to accomplish the discharge of the sureties?

The special master and court below held the sureties were not discharged, and whilst we concur with them in their conclusion we have a different reason and one independent of reasons given by the master:

We claim that John A. Erwin, in seeking to resign his trust, and F. P. Gray, who wanted the sole administration, both had interest adverse to the three minor heirs, and that in such case the acknowledgment of service of John A. Erwin, as guardian for the minors, G. H. Tumlin and L. T. Erwin, was insufficient and ineffectual, and also the acknowledgment of F. P. Gray, as guardian of Cora Gray, minor. This is the only service shown in the record and is the only service directed to be made in the citation itself (page 122).

Section 1821 of the Code of Georgia provides that whenever a minor is interested in any litigation pending in any court of this State and has no guardian or his interest is adverse to that of his guardian such court shall have power to appoint a guardian *ad litem* for such minor.

And on the 25th of February, 1876, the Legislature passed an act declaring that the mode of service of writs, bills, petitions, citations, and other legal proceedings in the courts of this State on minors shall be as follows: Providing, first, for service on minors under fourteen years of age, and section 2d enacting—

"If the minor is over fourteen years of age service may be made by delivering to him personally such copy. When the return of such service is made to the proper court and order taken to appoint said minor a guardian *ad litem*, and such guardian *ad litem* agrees to serve, all of which must be shown in the proceedings of the court, then said minor shall be considered a party to said proceedings." (Acts of 1876, page 103.)

This presents the question, Were these minors parties to said proceedings at all; and, if they were not, how could Erwin's resignation be effectual as against them? And, if not good as to them, it was good for no purpose whatever.

The Code of 1882, section 2610, provides for the resignation of administrators, and directs that "the ordinary shall cite the next of kin of the intestate to appear and show cause," &c.

But ,passing to the next question presented, Did Erwin's resignation, if valid, accomplish the release and discharge of Erwin as security, and of the appellants who were sureties on the joint and several bond of Frank P. Gray and John A. Erwin?

We say it did not, and we call attention to section 2510, Code of Georgia:

"If two or more administrators unite in a common bond, all the sureties are bound for the acts of each administrator and the administrators themselves are mutual sureties for each other's conduct."

The first Code of Georgia, which went into effect January, 1863, has same provision; so has the Revised Code. This was the law, then, at the time the bond signed by the appellees was made, and not only governs it, but becomes part of it, and should be read as if inserted in the bond itself.

I quote, in this connection, the language of the Court in case of Von Hoffman *vs.* City of Quincy, 4th Wallace, page 550:

"It is also settled that the laws which subsist at the time and place of making of the contract and where it is to be performed enter into and form a part of it as if they were expressly referred to."

So each of the appellees became bound, and agreed to be so as long as said administrators or either of them remained in office, or until they had administered said estate and paid any

balance in their hands to the persons, respectively, entitled to the same by law.

Prior to the act of February 10th, 1854, there was no provision in the laws of Georgia for the resignation of an administrator. He enlisted for the war, could die out, or be removed for cause, and this act (see page 36 of acts of 1853 and 1854) is incorporated in section 2610, Code of Georgia. It seems to contemplate the resignation of a sole administrator, but is doubtless broad enough, under section 3 of the Code, paragraph 3, to include one of two or more joint administrators. That paragraph reads: "The singular or plural number shall each include the other, unless expressly excluded."

But the provision about naming a successor is inoperative in case of a joint administration, because the whole trust remains in the survivor—one fills the office as effectually as two or more. Indeed, the law prefers a sole to a joint administration.

The common law is of force in Georgia, expressly adopted (Cobb's Digest, page 721), and by it the power of an executor is not determined by the death of his co-executor, but survives to him. (2d Williams on Ex'rs, page 814.) And so, likewise, if administration has been granted to two and one dies the other will be sole administrator, and all the power of the office will survive to him. (Same authority and page, citing 2d Ves. Sen., 267 and 268; Touchst., 485 and 486; 8 Atk., 509; 1 Ves. Sen., page 9.)

Hudson *vs.* Hudson, *cas. temp.*, Talb., 127; also, 1st Williams on Ex'rs, page 390, citing 2d P. Wms., 121, Com. Dig., B. 7; and see also Adams *vs.* Buckland, 2d Verm., 514; Bac. Abr., 56, tit. Executors (G.); Will. on Ex'r, Book 4, chap. 1st, page 778. In case of death entire interest vests in survivor. Lomax on Ex'rs, Book 4, chap. 1st, page 333.

That the ordinary could not make a new appointment to the office of administrator while it was not vacant seems obvious, and is so declared in 6 Ga. R., page 432–'4, and by

this Court in 8 Cranch, page 9, case of Griffith *vs.* Thugier, from S. Ca. In that case it was held the grant of letters was in such case absolutely void. (See also Kane *vs.* Paul, 14th Peters, page 33.)

As heretofore stated, administrators could not resign in Georgia at all before act of 1854, and I have found no statute or decision declaring the effect of a resignation by one of two joint administrators. I presume none was necessary. Provision had been made for cases resulting from death or removal, and they would, of course, apply in all cases. The Code provides, section 2514:

"If there are more administrators than one and complaint is made against one only and his letters are revoked, the entire trust remains in the hands of the other."

And section 3440 provides:

"An action against two joint administrators or executors does not abate by the death of one, but proceeds against the survivor."

Section 2499, survivorship. If administration has been granted to more than one, upon the death of either the right of administration survives to the other.

And in 63d Ga. R., page 369, it is held that the survivor of two executors can sue the representative of the deceased executor, the Court saying that while both were alive they had equal powers; one dead, the other succeeds to the powers of both, &c. People *vs.* Byron, 3 John. C., 53, is a case in principle identical with the one at bar. The head notes are as follows:

(1.) In an action of debt on a bond against the surety of two guardians * * * that they should faithfully execute the trust respectively reposed in them according to the terms of the order * * * appointing them, and render a true and faithful account thereof when required.

(2.) Where one of the guardians died it was held "that the trusts survived, and that the surety was responsible for the acts of the surviving guardian, the bond being coextensive with the trust."

(3.) The trust of such guardian likened to that of an administrator by Radcliff, J., and Kent, J.

The case of Braxton *vs.* State, 25th Ind., is also in point.

Throop and Johnson were coexecutors, having executed joint bond. Throop died, and the assets of the estate came to the hands of Johnson; and Braxton; administrator of deceased, coexecutor, insisted his intestate's estate should not be held liable for the default or waste of the survivor. The court held it would not be liable but for the bond, but that on the bond Throop's estate and the sureties were liable.

This case referred to and approved in Prichard *vs.* State, 34th Ind., 137.

In this case one of the principals and two of the sureties on joint administration bond were held liable as cosureties in a case where the principal sued had nothing to do with the administration of the assets.

See Brandt on Suretyship and Guarantee, section 498, under heading of liability and rights of surety of two executors or administrators when one dies or ceases to act. The authorities there referred to are 17 Mo., 453; 59 Mo., 17; 15 Mo., 662; and see other cases not there cited—Clark *vs.* State, 6 G. and J. (Md.), 258; Kirby *vs.* Turner, Hopkins' Ch. R. (N. Y.), 309; Green *et al. vs.* Hanberry's Ex'rs, 2 Brockenb., 403; Lomax on Ex'rs, page 182, par. 22, citing 8 Leigh, 54; 2 Brockenbr., 159 and 403; Robson's Practice, 412.

And counsel for the appellees say that the ordinary had no power under the law to make a new appointment of Frank P. Gray to the office of administrator, and claims also that he did not exercise any such power.

The proceedings show (pages 121, '2, '3, and '4) that Erwin only asked to resign, stating in his petition that Frank P.

Gray, coadministrator of your petitioner, is willing to give new bond and carry on said administration of said estate alone.

The citation says not a word about the appointment of a successor. On May 1 the return term of the citation, Frank P. Gray gives his assent in writing to Erwin's resignation conditionally, "I retaining the sole administration in my own name," and proposes to give such bond in furtherance of the same as the ordinary may deem proper in the premises (page 123).

The order granted at May term declares that the resignation of Erwin be allowed, and that Frank P. Gray, the coadministrator of said John A. Erwin, be, and he is hereby, declared and appointed the sole administrator of the estate, and required to give new bond, &c.

The ordinary by this order declared just what the law declared in such cases.

If he had regarded the office vacant and the appointment a new one it would have been his duty to administer to him the oath provided for every administrator in section 2504 of the Code, and it would also have been his duty to appoint and grant to him letters of administration *de bonis non* under section 2490 of Code. "Administration *de bonis non* is granted upon an estate already partially administered and from any cause unrepresented."

None of this was done. Erwin stepped out and Gray succeeded as survivor, and the ordinary, by the proceedings had before him, simply recognized this fact. No new letters were granted or issued. There seems to have been a perfect understanding between Erwin and Gray that Erwin should be allowed to resign and Gray retain the sole administration, and one of the terms of this agreement was that Gray should give a new bond. Erwin says in his petition that Gray is willing to do this, and Gray says he is willing to give a new bond, and it was also agreed that Gray should give Erwin a bond to indemnify him against loss and his sure-

ties from loss on account of bond given by him. The consideration for this bond was the release to Gray by Erwin of all his claim to commissions and fees for services performed by him. (See pages 129 and 130 of Transcript.) Before leaving this branch of the argument I want to suggest that the special master, by his report, sustains the views I have been contending for (see pages 107 and 108 of his second report), where he refers to and adopts items 39 and 40 of original report. Item 39, page 59, refers to previous items of report—12, 13, 14, 15, and 16—and states the position claimed by the parties; and item 40 I copy:

"The evidence shows that Erwin did not apply to the court of ordinary for the discharge of the sureties, and that no such application was made on their behalf. Erwin applied for his own discharge as administrator and not as surety to Gray; hence there was not and could not have been any binding order or judgment of discharge of any of the sureties under the pleadings, unless the discharge of Erwin, as administrator as matter of law discharged the sureties. Did it have that effect or not? The evidence shows that on Erwin's discharge as administrator Gray was not reappointed to the office and took the estate as administrator *de bonis non*, but that he continued in office; his was not a new administration, but the trust continued in him." (Items 12 to 16; Evidence, page 388.)

Here the master finds distinctly and positively that Gray continued in office and was not reappointed and refers to evidence which is not in this printed record to support his finding on that point, and this particular finding is not excepted to by appellants or assigned as a ground of error. We insist that the appellants are concluded on that point of the inquiry.

They except and assign error on his next finding, which is as follows, on page 60 of Transcript:

"It is some act of the creditor and not the act of the law which discharges a surety." (Code, 2152, 2154, 2862.)

"In this case Erwin's discharge as administrator was the act of the law and not the act of the creditors or parties at interest. The ordinary was not the real party at interest but only the nominal party, the heirs and creditors of Tumlin's estate being the real parties. Hence I conclude that Erwin's discharge did not have the effect to discharge the sureties on the bond given by Gray and Irwin."

The court below may have formed its opinion on the conclusion of fact reported by the master, that Gray was not appointed administrator but took the office of survivor, and we say appellants are not now in position to controvert that conclusion of fact.

From the terms of the joint bond, as expressed on the face thereof, these sureties were liable until this estate was fully administered according to law. Yet we admit that, as there was a law of force in Georgia at the date thereof authorizing the discharge of sureties, these sureties could have been discharged in the manner pointed out by that law without impairing the obligation of this contract, and that is so because such law then existing became part of the contract, as hereinbefore contended.

We do insist, however, that the terms and conditions of that law must be strictly complied with; it is not only law but also contract.

Section 2509, Code of Georgia, makes the provisions of the code in reference to relief of sureties on guardians' bonds applicable to sureties on administrators' bonds, and said provisions are found in the Code, section 1817. This section of the Code has been so fully construed and passed upon by the supreme court of Georgia that I refer to their decision to show that there was not and could not be any valid discharge of the sureties in this case. (See Dupont *vs.* Mayo, 56 Ga. R., page 304.)

The points decided were as follows:

1. The surety on a guardian's bond can obtain no discharge under section 1817 of the Code without a petition, as

required by section 4114 of Code, and having the ordinary to cite the guardian to appear and show cause against the application. The surety must sue in this manner for his discharge, and process must issue in terms of the law—that is, the guardian must be cited.

2. An order of discharge based on no such proceeding, but simply accepting a new bond already executed by the guardian, with satisfactory security, in place of the old and declaring a former surety discharged, is void.

3. Where the order of discharge does not recite that the surety has petitioned or that the guardian has been cited, and these facts do not otherwise appear, but the order on its face rather indicates some informal proceeding by consent, there is no presumption that more was done than is set forth in the record.

In this case the special master reports:

"The record, however, does not show that the sureties on said bond or any one in their behalf ever instituted proceedings to be relieved from said bond, and it does not show any express proceedings to be relieved from his legal position of surety as to said Gray" by Erwin himself.

This conclusion of fact of the master is not excepted to and is fully supported by the record, and we rely upon the decision above, from which the head notes are copied, as our only and a full answer to this alleged ground of error. There was no application, no process or citation for service, no trial, no due process of law, as required by law and by the contract.

Section 2507, Code, makes the administrator and sureties joint and several obligors, and so does the bond.

Parties signing bonds are conclusively presumed to know the law existing at the time, and this law enters into the contract, giving rights and imposing liabilities and making

provision for contingencies which may happen in the conduct of human affairs. Thus they become bound for the acts of each, with full knowledge that one might die, be removed, or resign and then the other would take the office and be liable as administrator, and they would be bound for the conduct of the survivor.

The next exception and ground of error I will take up is exception second to the second report of special master, page 216:

"Error in holding that the discharge of J. G. B. Erwin, H. C. Erwin, and L. S. Ramsaur because their names had been improperly signed to the joint bond of Gray and Erwin, administrators, by their attorney-in-fact, did not discharge all the sureties."

The special master reports and finds, on page 100, in substance—

"That there was no alteration of the contract nor release of co-sureties because, as a matter of fact, they never signed the bond.

"That it was the duty of the appellants, if they intended to rely upon the fact that others were bound with them, to investigate for themselves before signing; that they could easily have done so in this case, and the law charges them with notice and with the assumption of the risks incident to the actual facts of the case, and he refers to Brandt on Surety and Guarantee, sec. 358; 39 Maine R., 541; 2 Heads (Penn. R.), 613; 64 Mo., 167.

"That it was the ordinary's duty to take a good bond to protect the estate, but not to protect any one as surety on the bond.

"That he, the ordinary, is on one side and the administrator and his sureties on the other; that, of course, he must act in good faith and be guilty of no fraud or concealment. None of this is charged on the ordinary in this case."

The ordinary did not know of the defect in the powers of attorney at the time the sureties signed the bond, and he closes his report on this subject by asking the question,

Whoever heard of one surety suing the ordinary because another who was apparently bound on the bond was not so bound?

Here the special master finds there was no fraud nor concealment nor bad faith on the part of the ordinary, and further finds that he, the ordinary, did not know of the defect at the time of signing.

This finding is not directly put in issue by this exception. The allegation is made in an argumentative form that the ordinary knew of the defect and misled the sureties, and the exception claims that he should have held that the sureties were thereby discharged.

If the fact stated in this exception—that the ordinary in having the bond executed in his presence must have known the want of authority, &c.—is proof of the fact of such knowledge it ought also to prove knowledge on the part of securities present at the execution of the bond.

We say this exception is demurrable in form; it is argumentative and evasive; it does not distinctly put in issue that the ordinary had knowledge of the fact that the powers of attorney as originally written or as altered by erasure, &c., were insufficient. Whether these powers as originally written were binding was a question of doubt. If the Erwins and Ramsaur knew that a joint bond was to be given by Gray and Erwin, and that they would be liable for the acts of each, they would, I think, be bound, because they would know in such a case that they could not be surety for Erwin without being for Gray also; so there may have been questions of fact and law involved in the attestation of the bond, in whatever shape it was first presented to the ordinary; he may have had an honest opinion about it, although, as it turned out, a mistaken opinion. The ordinary was not bound to advise other parties signing the bond or to acquaint them with defects or irregularities, particularly in a case where he may have had erroneous views as to an alteration being mere matter of form, &c., and may have regarded the signatures of all valid and sufficient.

And I deny generally that the knowledge and concealment charged in this exception would, if proven, discharge the appellants as sureties; but I say knowledge on the part of the ordinary at the time the sureties signed is not proven.

J. A. Howard testifies on page 144 of Transcript:

"I think these powers of attorney were in same condition when brought to my office as they now are—altered by erasures and writing as they now appear."

Well, the master could make his finding upon that testimony. There is nothing in the evidence before him to contradict it, and if the ordinary is correct in his recollection he has a right to presume, and doubtless did presume the alteration was made before the execution of the instrument. (See 45 Ga. R., page 544, and cases there cited.)

But suppose it was not altered then and did not authorize the signatures to the bond, is not the testimony of the ordinary sufficient to show that he had no knowledge of any defect? There is no testimony to show when these powers of attorney were presented to ordinary, except the fact of their record, August 4, 1875, two days after the execution of the bond.

But if presented before or at the time of the signing, appellant's charge that the ordinary knew the contents of the powers of attorney, and also all the facts so as to be able then and there to determine and know absolutely the powers, were not good in law. Where is the evidence that he knew, first, all the facts, and then the exact law resulting from the real ascertained facts? And without such knowledge there could be no concealment. Now, J. A. Erwin testifies, 7th answer, on page 148: "That some days, or perhaps two or more weeks, after making the bond the ordinary (Howard) brought the power of attorney to his (deponent's) store and said they were informal and must be corrected before he could place them on record, or something to that effect; * * * and that he (Erwin) made the change in the ordinary's pres-

ence; thought of nothing wrong," &c. In this Erwin (the witness) must be mistaken as to time, because the bond was recorded in two days; yet his testimony would only go to prove that the ordinary, when he commenced the record of the bond, discovered what he thought was an irregularity, and went to Erwin at once to have it corrected. So far from proving that the ordinary knew of the insufficiency at the date of the execution of the bond, it is evidence that he did not discover it until afterwards.

If there is conflict the master had a right to believe Howard, who is disinterested, before Erwin, who had procured the consent of these his kinsmen, two being second cousins and one a brother-in-law, to sign a bond for him.

This exception is solely upon the ground of knowledge on the part of the ordinary, and concealment misleading the other sureties, &c., and we say insufficient in law and unsupported by testimony.

The truth is, all the appellants signed the bond before the Erwins and Ramsaur, except W. J. Benham.

He (Benham) testified that his name was next to the last one on the bond: "Don't recollect seeing the names of H. C. Erwin, Ramsaur, J. G. B. Erwin on it; saw that some of the names were signed by attorney, but I did not inquire whether the signatures were genuine, nor as to the authority of agents who signed."

If he acted and signed the bond influenced by seeing these signatures and believing them genuine he is a poor witness to prove it by, and who but him could prove the fact. Benham testifies to no understanding with the ordinary, principals, or other sureties as to who were to sign the bond.

It should be borne in mind here that there is no proof in this case that there were any names of sureties or proposed sureties written in the body of the bond or other facts alleged which could put the ordinary on notice as to who should sign this bond, and the uncontradicted testimony of the ordinary is as follows:

"There was no agreement or understanding in my presence or with me when one of the securities signed it that certain other names were to go on it. Witness did not know who were to be on the bond till it was returned to me in the office."

The policy of our courts in a case similar to this, but much stronger in its facts, is very fully and clearly declared in the case of Lewis and others *vs.* Board of Commissioners, &c., of Gordon County (70 Ga. R., 486 *et seq.*)

In this case the superior court on the trial below refused to hear parol evidence to show that the sureties proceeded against signed the bond and left it with the ordinary with the distinct statement, made to the ordinary, that they were not to be bound unless two other parties, naming them, also signed the bond, and the Supreme Court sustained this, exclusion of the evidence, on a demurrer to its sufficiency, &c., in law.

And still later, in the case of Mathis, sheriff, *vs.* Morgan (71 Ga. R., page 517), the Supreme Court held that Morgan, who was the last signer on the bond, was not relieved by the fact that Mrs. Deason, whose name appeared just above his, had not signed the bond or authorized its signing.

The case of Dair *vs.* The United States (16 Wallace, page 1) was referred to in both of said cases, and it and the other authorities cited in said decisions are all referred to and relied on here; also 73 N. C. R., 138; 7 Neb., 4; 32 Gratt., 595; 119 Ill., 579; 69 Iowa, 269.

It will be noticed on looking at the signatures to this bond that but two of the appellants were present and signed it in person, and they were W. J. Benham and J. J. Howard. W. J. Benham testifies to no condition, understanding, or agreement and does not recollect seeing the names of the Erwins and Ramsaur on the bond.

J. J. Howard testifies to no conditional agreement or delivery in presence of the ordinary and admits he did not

know whether the list of names would go on the bond. The list was furnished him by Erwin.

He (Howard) signed as attorney-in-fact for A. W. Milchett and Robert L. Rogers, and W. T. Wofford signed for James M. Veach and A. C. Trimble, as attorney, &c.

He (Wofford) testified that Gray got up a list of names to go on the bond, and he showed the list to Veach and Trimble.

"I was instructed not to sign their names unless others signed."

But he did sign them and said nothing to the ordinary about such instructions; his power to sign was not limited in the power and could not be by private verbal instructions. He did not know that Erwins had not signed; of course not, because he signed for his principals before their names were written.

I want to note further that all the testimony of W. L. Rogers, A. C. Trimble, and James M. Veach was objected to on the ground it set up no legal defense, and the objection was sustained and the testimony ruled out (pages 143 and 144), and no exception was taken by appellants to this ruling.

On the subject of the discharge of the appellants it never has been insisted that the mere fact of taking a new bond would discharge the old one, but for fear it may be I refer to the case of Towns *vs.* Stephens *et al.*, 9th Ga. R., page 585.

The Chief Justice, on page 589, says:

"The first (bond) was given to protect the people against the official misconduct of Stephens, the sheriff. The *cestui que trust.*, the beneficiaries of the obligation, being incapable of giving or withholding their assent to this substitution of securities, it could not be done without authority of law, and this distinguishes this case from one of ordinary agency."

Bonds like this are given to the ordinary, who is a naked trustee, charged by law with the duty of taking a sufficient bond.

A substantial compliance with the requisitions of section 2505 is declared to be sufficient, and the tendency of our courts is to restrict or deny his power to make contracts about conditional deliveries to him. Being the obligee, a bond cannot be delivered to him as an escrow (Code, sec. 2693, 14 Ga., 155; 47 Ga., 445), and after delivery the deed takes effect and speaks for itself, and its terms cannot be altered or varied by parol.

It ought never to be put in the power of the parties signing such bonds to procure, without the knowledge of the ordinary, the signature of a minor or married woman or other person incapable of making such a contract, and then insist they were not bound on account of the invalidity of such signature.

The next ground of error is the forfeiture of commissions. (See page 216 of Transcript.)

This exception and assignment of error concludes as follows:

"The evidence submitted to said special master and reported by him does not require a forfeiture of said commissions, neither does the statute require such forfeiture."

As none of the evidence submitted to and reported by the special master is in the printed testimony, it will be difficult for this Court to pass upon what the evidence required. The special master refers to this testimony as showing how the administrator managed the estate, on page 106, overruling 22d exception of Gray's and giving names of witnesses and pages on which their testimony is found, and refers to others whose testimony is cited in item 47 of former report. This item 47 is also omitted in printed transcript. But the conclusions of the special master are in the record, and where they are not put in issue by exceptions filed by appellants I shall consider them as conclusive upon questions of fact.

This forfeiture was insisted on by counsel for the appel-

And the master, on pages 85 and 86, reports additional items of charge and liability of administrators, after and outside of returns, amounting to $4,865.82.

What part of these debits should have been embraced in this joint return we have no means of ascertaining.

We come now to the other side of the account—administrators' credit:

By note on Gilbreath & Co. (this disallowed as insolvent) ---------- $750 00

This was for cotton sold by administrators at private sale, and no security taken. They claimed and had credit allowed them for it in their return. (See master's report on Gray's 10th exception, page 103; also Code, sections 2555 and 2556.)

Next item of credit:

By note on Thomas Tumlin—no security taken from him and it is worthless ---------- $171 28

Then follows some credits claimed differing from master's finding, but not material, until we come to a credit for division of land in kind, $114,456.00 @ 3 %, $3,433.68.

The master in first report allows $500.00, but in the last allows nothing.

What the administrators did, what service they rendered, and the value thereof we have no means of ascertaining; we have only the fact that the ordinary allowed the charge, and the master first reduced it and then disallowed it.

The law (Code, section 2584 *et seq.*) provided for such division to be made by three or more freeholders, called appraisers, and seems to cast the whole burden and responsibility on them. Of course, the property should be pointed out to the appraisers, but this would be but little trouble to the administrators, who had just made and returned an inventory and appraisement of the estate. I have no doubt both Gray and Erwin were there, and that all the adult

heirs were there looking after their respective interest; indeed, it is so stated in the return of the freeholders.

Gray was the husband and guardian of Cora Gray, minor, and Erwin was the kinsman and guardian of Lewis T. Erwin, also guardian of G. H. Tumlin, and both had the right to be present, and were required by their duty to their wards to be present, and had the right to charge the estate of their wards for their time, trouble, and expense in looking after and protecting their interest. This was a simple partition, in effect, between the heirs-at-law of Tumlin, as land in Georgia descends to and vests immediately in the heirs-at-law. (Code, section 2483.)

"Upon the death of the owner of any estate in realty the title vests immediately in his heirs." (See also section 2246.)

And in this instance it does not appear who made the application; whether administrators or heirs.

By section 2486 of Code it is provided the administrator may recover land of the heir by showing it is necessary to do so in order to pay debts or make proper distribution, &c.

There is no evidence of any order of sale or proof of any necessity in this case of disturbing the heirs in their joint possession and title to these lands.

1. Where division of an estate is made by devisees by agreement followed by conveyance in which executor joins as devisee he is is not entitled to charge commission upon its value.

Metcalfe *vs.* Colles, 2 N. J. (L. ed.), 527; 9 Cent. Rep., 923.

So I say the administrators never delivered this land in kind to the distributees; that they never acquired the title to it so as to enable them to parcel it out to the heirs.

We will refer to their petition for extra compensation, found on page 125 of Transcript, and it will be noted the petition is headed, Regular term, May 1, 1876.

And the order allowing it is granted same term, same day, without notice, without service or citation or time for it, and, so far as it appears, without evidence, and on the simple statement in the petition that as "The responsibility and trouble in making the transfer has been considerable, the ordinary passes an order allowing the very highest compensation in his power."

The Code, section 2592, provides:

"No compensation shall be paid to any administrator or executor for delivering over of any property in kind, but the ordinary may allow reasonable compensation for such service, not exceeding 3 per cent. on the appraised value."

This allowance by the ordinary of $3,433.68 embraced an allowance to Gray of 3 per cent. on $14,597 turned over, as claimed by him, as administrator, to himself as guardian of Cora Gray ---------- $437 91
Erwin to himself as guardian of G. H. Tumlin -- 346 07
Erwin to himself as guardian of L. T. Erwin ---- 226 50

In all ---------- $1,010 48

I think this charge is forbidden by law. Section 2591, Code, says: "The administrator is entitled to no commissions on debts, legacies, or distributive shares paid to himself," &c., &c., and the last clause of section 2595, Code, says: "and no commission shall be paid for handing over the fund to the successor of the trustee.:

I conclude what I have to say about this return by stating that Gray and Erwin claimed 10 per cent. commissions on interest collected without any proof in inventory or return that the interest was proceeds of money loaned.

The master (page 101, Transcript) says: "The approval of the probate judge makes the return *prima facie* correct, unless the return is illegal and fraudulent on its face; but in this case the evidence, I think, changes the burden of proof.

It shows that all the interest collected was not for loaned money."

Now, the question recurs, Was this joint return by Gray and Erwin a *just* and *true return* on oath or not, or is it on its face self-impeached, illegal, and fraudulent?

But, it is insisted, the allowance by the ordinary *ex parte*, as it was of this large commission, was and is conclusive. Such is not the law. (32 Ga. R., 82, 84, 85.)

Code, last clause of section 2527, says: "The return thus allowed and recorded shall be *prima facie* evidence in favor of the administrator of its correctness."

And section 2594 of Code, which is the second section after the one allowing compensation as claimed here, says: "In other cases of extraordinary services extra compensation may be allowed by the ordinary."

But in no case is the allowance of extra compensation conclusive upon the parties in interest.

And in 30 Ga. R., page 780, it is held: "The *ex parte* orders of the ordinary are no protection to the administrator for his illegal acts. (3 head-note, 72 Ga., 565, 3.)

Before leaving this joint administration, section 2517 of Code makes it the duty of the administrator to make a just and true inventory of all property, real and personal, of intestate. This must include debts, &c. (Section 2519.)

This, we say, they did not do. (See report of special master on page 51 of Transcript.) They made an incomplete one and never completed it during the joint or sole administration; and on page 59 the master reports that no inventory of wild and uncultivated lands had ever been made or returned to the proper court.

An imperfect list was made by Gray and turned over to the receiver.

Six years elapsed and a complete inventory is not made and returned. (See sections 2517, 2518, and 2523, Code.)

The last section is in these words:

"The neglect of an administrator to return a correct inventory and appraisement shall be held a sufficient ground for removal."

Gray's bad faith is admitted distinctly, on page 220, in order to save printing, &c.:

"We, for appellants, admit that each annual return by Gray (after the first by himself and Erwin) were found to be incorrect, in that he did not charge himself with all moneys collected in the preceding year and claimed credit to which he was not entitled."

I will specify only a few acts of misconduct—selling cotton, &c., on time without security, already alluded to.

Failure to make correct inventory and to specify rates of interest notes bore, already noticed. From February 19, 1873, up to February 24, 1875, any rate of interest was legal in Georgia.

In voucher 38, return for 1879, Gray obtains credit of $15,607.91 when he was only entitled to credit on it for $8,507. (See report, pages 61, 62, 63, and 64 of Transcript.)

He employed attorneys under a contract to divide fees with them (Report, page 64 of Transcript). He and Erwin never paid D. W. Peacock, surveyor, for surveying Tumlin lands, and his fee is audited by master (page 68).

Gray received $180.00 from one of three joint obligors and released him from liability, discharging the others and releasing the debt. (Master's report; see 22d exception of Gray, overruled, on page 106 of transcript; also pages 85 and 86 of Transcript, before alluded to; and see vouchers rejected, on pages 82, 83, and 84 of master's report, under the head of credits.

Now, is this administrator entitled to any credit for his maladministration and failure to administer this estate? There may be different rulings growing out of the diverse statutory provisions in different States.

The failure to make such returns as the law requires for-

feits commissions for that year in Georgia, and yet this may occur and the administrator act honestly and correctly.

By section 2190 of Code: "If an agent has violated his engagement he is entitled to no commission."

By section 1834 of Code: "Guardians shall be allowed same commission for receiving and paying out * * * as are allowed to administrators," and same principles obtain as to them as govern administrators, and right to extra compensation, but the last clause of next section, 1835, declares: "And when a guardian is removed for waste or gross mismanagement no commission will be allowed for any of his services."

In the case of Gray *vs.* Conyer's Adm'r, 70 Ga., 349, Gray, as attorney, had collected money and failed to pay over. The jury rejected his claim for commissions, and the supreme court sustained this finding, saying: "It would do the client little good to collect the money and not pay over, and thus force another suit and cause the client to incur other fees to get his money," &c. This is the same F. P. Gray whose commissions we say are here forfeited.

On this subject I find following authorities: "An unfaithful and negligent administrator forfeits his right to commissions."

Eppinger *vs.* Conepa, 20 Fla., 262.
Tourgamen's Successor, 36 La. An., 420.
Estate of John Cunrah, 13 Phil. (Pa.), 337.
Milligan's Appeal, 97 Penn. (St.), 525.
Walker *vs.* Walker, 9 Wall., 743.
Barney *vs.* Saunders, 16 Howard, 542.

Now, Gray was not technically and formally removed, but his hands were tied, the property taken from him, and he forbidden to meddle in the administration, and a guardian under like circumstances, by the provisions of section 1835 of Code, would forfeit all commissions, and under the decree in this case the injunction is made perpetual and receiver

continued until the estate is fully administered. No exception is filed to this, and we think it conclusive evidence of such fraud, waste, and mismanagement as to justify any court having a discretion in the matter in forefeiting commissions. (See decree, page 105 of Transcript.)

The last ground of exception (page 217) is to the jurisdiction of the court.

It seems to be based upon the idea that the court had rendered a decree in favor of the heirs of Lewis Tumlin, deceased, who were residents of Georgia, against Gray and his sureties, who were citizens of same State. This view is not correct.

James L. Rice and his wife, Ada S. Rice, are the only complainants; they aver their residence in Tennessee, and this averment is nowhere traversed or denied.

Their bill was a proceeding to ascertain and recover the amount due Ada S. Rice as one of the distributees of the estate of Lewis Tumlin, and in order to do this all the defendants were proper parties; debts must be ascertained and paid and advancements to the distributees ascertained and counted in the estimate.

The court had power to take the administration out of the hands of F. P. Gray, administrator, and when it did so and appointed a receiver it undertook itself to administer this estate. One of its first duties in this administration was the collection of assets due the estate. A large portion of these assets had gone into the hands of F. P. Gray and had been by him wasted, and the appellants had become, as his sureties responsible for these wasted assets, and the decree in this case simply finds the amount of Gray's default and orders appellants to pay the amount into court in order that the court may proceed with the due and orderly administration of this estate.

The objection is made to the power of the court to pronounce a decree in favor of the resident defendant distributees. To this there are two answers: The court has pro-

nounced no decree in their favor; and second, if the court had jurisdiction of the cause originally and of the subject-matters of the bill they could, of course, pronounce any decree which became necessary in the progress of the cause.

Here it has simply ascertained for what amount of the assets wasted the appellants and other sureties and their common principal are responsible, and orders it paid into court. To whom this amount will be distributed does not yet appear. The bill is retained in court for further hearing and direction.

It would be strange that complainants should have the right to go into the circuit court and have Gray, the administrator, suspended and the effects placed in a receiver's hands, and that at the same time a creditor or an heir could not receive the amount due them on the final settlement of the estate, because they could not have instituted the bill in the United States circuit court.

When a United States court of equity gets jurisdiction of a cause it will hold it and administer as full and complete relief as any other court could do, and in this case it is apparent that in order to ascertain and pay Mrs. Ada S. Rice her distributive share the whole estate had to be fully administered, including advancements and payments to distributees, and if the objection obtains that no party who could not have brought the suit can receive such a share of the assets as belong to him or them, it would seem to result either that complainants could not recover where the court had acknowledged jurisdiction as to them, or that recovering the fund or part of it must lie in court on account of a disability on the part of certain beneficiaries to claim and receive it.

W. K. Moore,
Attorney for Appellees.

131-319

AGREED RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 266.

WILLIAM J. HAWKINS, PLAINTIFF IN ERROR,

vs.

JOHN GLENN, TRUSTEE OF THE NATIONAL EXPRESS AND TRANSPORTATION COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA.

FILED MAY 7, 1886.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 266.

WILLIAM J. HAWKINS, PLAINTIFF IN ERROR,

vs.

JOHN GLEN, TRUSTEE OF THE NATIONAL EXPRESS AND TRANSPORTATION COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA.

INDEX.

	Original.	Print.
Writ of error	1	1
Return to writ	2	1
Citation	3	2
Proof of service of citation	3*a*	2
Caption	4	2
Prosecution bond	4	3
Summons	6	3
Return on summons	7	4
Complaint	8	4
Time allowed to answer or demur	14	7
Answer	14	7
Amendment to answer	19	10
Verdict	21	11
Judgment	22	11
Order setting aside judgment	24	12
Judgment	25	12
Order as to amount of bond, &c.	26	12
Bill of exceptions	27	13
Extract from stock book	29	14

JUDD & DETWEILER, PRINTERS, WASHINGTON, NOVEMBER 15, 1888.

	Original.	Print.
Testimony of W. J. Hawkins	29	14
Exhibit A—Record in case of Glenn's adm'r *vs.* N. E. & T. Co. *et al.*	32	15
Subpœnas	32	16
Bill	34	17
Exhibit W. W. G. No. 1—Record of judgment in superior court of Baltimore city	41	24
2—Deed between N. E. & T. Co. & Hoge *et al.*, Sept. 20, 1886	42	24
Order on Anderson *et al.* to plead, &c.	45	27
Order *pro confesso* as to Anderson *et al.*	45	27
Amended and supplemental bill	45	27
Exhibit R—Record in Glenn *vs.* N. E. & T. Co. in superior court of Baltimore city	49	31
Summons	50	31
Declaration	50	31
Promissory notes, &c. (omitted in printing)	51	—
Account (omitted in printing)	57	—
Order fixing damages	61	34
Judgment by default	61	34
Clerk's certificate	62	34
Subpœnas	63	35
Order on absent defendants	64	36
Answer of M. B. Poitiaux	65	37
Order on Anderson *et al.* to appear	66	38
Order *pro confesso* as to Anderson *et al.*	66	38
Proof of publication, &c.	66	38
Decree of Oct. 6, 1879	68	40
Answer of Jos. R. Anderson	69	41
Order on petition of B. & O. R. R. Co. (omitted in printing)	70	—
Petition of B. & O. R. R. Co. (omitted in printing)	71	—
Order on petition of Bank of Commerce (omitted in printing)	72	—
Petition of Bank of Commerce (omitted in printing)	72	—
Order on petition of P. W. & B. R. R. Co. (omitted in printing)	73	—
Petition of P. W. & B. R. R. Co. (omitted in printing)	74	—
Report of Com'r Kean	75	42
Statement No. 1. (omitted in printing)	77	—
Statement No. 2	110	44
Depositions, &c. returned with Comm'rs report (omitted in printing)	111	—
Order for continuance (omitted in printing)	156	—
Decree of Dec. 14, 1880 (parts omitted in printing)	157	45
Answer of Hoge & Kelly	207	49
Answer of J. B. Hoge	215	56
Answer of J. J. Kelly	216	57
Amended and supplemental report of Com'r Kean	216	57
Exhibit A—Extracts from proceedings of b'd directors	218	59
B— " " by-laws, &c.	219	59
C— " " records of board directors	219	60
D— " " " "	220	60

	Original.	Print.
Act of incorporation and amendment	221	61
Opinion of court	225	64
Decree of Jan. 3, 1881	231	70
Clerk's certificate (omitted in printing)	232	—
Index (omitted in printing)	232a	—
Bond on writ of error	234	71
Clerk's certificate	236	72
Stipulation as to printing record, &c.	237	72

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern district of North Carolina, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between John Glenn, Trustee of the National Express and Transportation Company, as plaintiff, and William J. Hawkins, defendant, a manifest error hath happened, to the great damage of the said William J. Hawkins, defendant, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, 1886, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 25th day of November, in the year of our Lord one thousand eight hundred and eighty-five.

[Seal United States Circuit Court, Eastern Dist. of N. C.]

N. J. RIDDICK,
Clerk of the Circuit Court of the United States for the Eastern District of North Carolina.

Allowed by—
AUG. J. SEYMOUR,
District Judge.

[Endorsed:] No. 291. Civil. Writ of error. Filed November 28th, 1885. N. J. Riddick, clerk, by V. Royster, deputy clerk.

2 *Return to Writ.*

UNITED STATES OF AMERICA,
Eastern District of North Carolina, } *ss:*

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the seal

of said circuit court, at office, in Raleigh, in said district, this 23 day of March, A. D. 1886.

[Seal United States Circuit Court, Eastern Dist. of N. C.]

N. J. RIDDICK, *Clerk*,
By V. ROYSTER,
Deputy Clerk.

3 The United States of America to John Glenn, trustee of the National Express and Transportation Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, 1886, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of North Carolina, wherein William J. Hawkins is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Augustus S. Seymour, judge of the district court of the United States for the eastern district of North Carolina and one of the judges of the said circuit court for said district, this 25th day of November, in the year of our Lord one thousand eight hundred and eighty-five.

AUG. S. SEYMOUR, *Judge, &c.*

3*a* [Endorsed:] No. 291. Civil. Citation. Filed December 11th, 1885. N. J. Riddick, clerk, by V. Royster, deputy clerk.

On this eleventh day of December, in the year of our Lord one thousand eight hundred and eighty-five, personally appeared Sam'l F. Mordecai before me, the subscriber, and makes oath that he delivered a true copy of the within citation to Daniel G. Fowle, attorney for John Glenn, trustee of the National Express and Transportation Company.

S. F. MORDICAI.

Sworn to and subscribed the 11th day of December, A. D. 1885.
VITRUVIUS ROYSTER,
Deputy Clerk.

4 UNITED STATES OF AMERICA, } ss:
Eastern District of North Carolina, }

In the Circuit Court of the United States in and for said Eastern District of North Carolina.

Be it remembered that on the 5th day of November, A. D. 1883, John Glenn, trustee of the National Express and Transportation Company, a citizen and resident of the State of Maryland, filed his prosecution bond and sued out of the office of the clerk of the cir-

cuit court of the United States for the eastern district of North Carolina against William J. Hawkins, a citizen and resident of the eastern district of North Carolina, a writ of summons; which said prosecution bond and writ of summons are in the words and figures following, to wit:

Prosecution Bond.

UNITED STATES OF AMERICA,
Eastern District of North Carolina:

Circuit Court, Fourth Circuit.

JOHN GLENN, Trustee of the National Express & Transportation Company,
against
WILLIAM J. HAWKINS.

5 Know all men by these presents that we, John Glenn, trustee, as principal, and J. P. Haywood, as surety, are held and firmly bound unto the defendant in the above-entitled action in the sum of three hundred dollars; to the payment of which we bind ourselves firmly by these presents.

Sealed with our seals and dated this 5th day of November, 1883.

The condition of the above obligation is such that whereas the plaintiff in the above-named cause has brought action against the said defendant therein:

Now, if the said plaintiff shall prosecute his said action with effect or, in case he fail therein, shall well and truly pay all such costs and damages as shall be awarded and recovered against the said plaintiff in said action, then the above obligation is to be void; otherwise to remain in full force and effect.

JNO. GLENN, *Trustee*, [SEAL.]
By D. G. FOWLE, *Att'y.*
J. P. HAYWOOD. [SEAL.]

Endorsed: Prosecution bond. Filed November 5, 1883. N. J. Riddick, clerk.

6 *Writ of Summons.*

UNITED STATES OF AMERICA,
Eastern District of North Carolina:

Circuit Court, 4th Circuit.

JOHN GLENN, Trustee of the National Express & Transportation Company, Plaintiff,
against
WILLIAM J. HAWKINS, Defendant.

The President of the United States of America to the marshal of the eastern district of North Carolina, Greeting:

You are hereby commanded to summon William J. Hawkins, a citi-

zen and resident of the eastern district of North Carolina, to appear before the judges of the circuit court of the United States at the next term of said court, to be held for the district aforesaid, at Raleigh, on the last Monday in November next, then and there to answer the complaint of John Glenn, trustee of the National Express and Transportation Company, the plaintiff herein, citizen and resident of the State of Maryland, which complaint will be filed in said
7 court within the first three days of said term; and let the said defendant take notice that if he fail to answer the said complaint within the time limited by law the plaintiff will take judgment against him for the relief demanded in the complaint, according to the regular course of the court.

Herein fail not and have you then and there this summons.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Raleigh, in said district, the 5th day of November, 1883, and in the 108 year of the Independence of the United States.

[SEAL.] N. J. RIDDICK, *Clerk.*

Return of Summons.

The said summons is returned into court with endorsements thereon in the words and figures following, to wit: "Service accepted. W. J. Hawkins. Nov. 8th, 1883."

Proceedings at November Term, 1883.

And now, at a term of the circuit court of the United States for the eastern district of North Carolina, it being the return term of
8 said writ of summons, begun and held in the city of Raleigh, in said district, at the court-rooms of said court, on the last Monday in November, A. D. 1883, and on the second day of said term, it being the 27th day of said month of November, A. D. 1883, before the Honorable Hugh L. Bond and the Honorable Augustus S. Seymour, judges presiding, the plaintiff, the said John Glenn, trustee, &c., as aforesaid, by his attorney, D. G. Fowle, comes and complains in the words and figures following, to wit:

Complaint.

In the Circuit Court of the United States for the Eastern District of North Carolina.

JOHN GLENN, Trustee of the National Express and Transportation Co.,
vs.
WILLIAM J. HAWKINS.

The plaintiff, complaining of the defendant, alleges—

I. That plaintiff is and was, at the time of issuing the summons in this case, a citizen of the State of Maryland and the defendant is a citizen of the eastern district, in the State of North Carolina.

II. That the defendant is indebted to the plaintiff in the
9 sum of seven thousand five hundred dollars, for that the defendant, on or about the first day of November, 1865, subscribed for two hundred and fifty shares of the capital stock of the National Express and Transportation Company, a body corporate of the State of Virginia, duly incorporated under the laws thereof, and thereby undertook and promised to pay to said company for each and every share so subscribed for by said defendant the sum of one hundred dollars, in such installments and at such times as said defendant might be lawfully called upon and required to pay the same, according to the legal tenor and effect of the law under which said company was so incorporated, whereby and by force of said subscription said defendant became and was received and admitted as a stockholder in said company.

III. That on the 20th day of September, 1866, the said National Express and Transportation Company, by its deed of that date, duly executed, acknowledged, and recorded, assigned and transferred to John Blair Hodge, C. Oliver O'Donnell, and John J. Kelly, in trust for the benefit of the creditors of said company, all its property, rights, credits, and effects of every kind, in trust to reduce the same to money and to apply the proceeds thereof to the trusts declared by said deed, including the trusts therein declared, for the payment of the debts of said company.

IV. That afterwards, in a certain cause instituted and de-
10 pending in the chancery court of the city of Richmond, in the State of Virginia, in which John W. Wright, sheriff of the city of Richmond, and as such official administrator of a certain William W. Glenn, deceased, and other persons claiming to be creditors of said company, were complainants, and the said The National Express and Transportation Company, the said John J. Kelly, John Blair Hodge, and certain other persons, officers of said company, were defendants, it was, on the 14th day of December, 1880, adjudged, ordered, and decreed by said chancery court, the same being a court of competent jurisdiction, that said plaintiff should be, and he was by said decree, appointed and constituted trustee to execute the trusts of said deed of trust in the room and stead of the trustees originally created by said deed of trust and to whom said deed was executed as aforesaid; and it was in said cause and by said court further adjudged, ordered, and decreed that a large amount of debts secured by said deed of trust of said National Express and Transportation Company remained unpaid and entitled to be paid out of the property conveyed by said deed, and that of the sum of one hundred dollars for each and every share of the stock of said company undertaken and promised to be paid for by the subscribers for said stock and their assigns, stockholders of said company, in such installments and at such times as said subscribers and their assigns might be lawfully required to pay the same according to the
11 legal tenor and effect of the law under which said company was incorporated and said stock subscribed for, the sum of eighty dollars per share had never heretofore been called for or required to be paid by the president and directors of said company,

and that said sum of eighty dollars per share for each and every share of said stock subscribed for yet remained liable to be called for and required to be paid by the subscribers for said stock and their assigns, stockholders of said company, according to the legal tenor and effect of their subscription for the same, as hereinbefore set forth.

That it was further adjudged, ordered, and decreed that it was necessary and proper that thirty per cent. of the par value of each share of said stock should be called for and required to be paid by the subscribers therefor and their assigns for the purpose of paying the debts of said company under the provisions of said deed of trust; and it was accordingly adjudged, ordered, and decreed by said court in said cause that a call and assessment be, and the same was thereby, made upon the stock and stockholders of said company and their assigns of thirty per centum of the par value of said stock, being thirty dollars on each and every share thereof, the same, when paid, to be paid and received by the said plaintiff as trustee under said deed in the room and stead of the original trustees therein named.

V. That plaintiff accepted the appointment so made by said decree and complied with the terms and conditions thereof, and
12 was and is duly qualified to act as such substituted trustee, and to have the rights and perform the duties conferred upon and required of him by said decree.

VI. That by force of said decree and of the statutes of the State of Virginia in such case made and provided, before accepting such appointment as trustee and qualifying as such, as required by said decree, he, the said plaintiff, then and there became and was and still is substituted to all the rights, powers, duties, and responsibilities of the trustees named in said deed of trust, and became and was and still is lawfully entitled to receive and collect the said assessment or call of thirty dollars per share on each and every share of stock of said company from the persons liable to pay the same.

And it was further adjudged, ordered, and decreed that he, as such substituted trustee, be, and he was by said decree, authorized and directed to collect and receive the said call and assessment and to take such steps to that end as he should be advised.

VII. That by force of said contract of subscription to the stock of said company, and of said call and assessment so made by said decree, the said defendant became and is indebted and liable to pay to plaintiff the sum of seven thousand five hundred dollars, being the amount of thirty dollars on each of said shares of the stock of said company so as aforesaid subscribed for by said defendant; and, being so liable to pay, the said defendant, in consideration thereof, promised to pay said sum to the plaintiff when thereto requested,
13 and the defendant, although requested by plaintiff, failed and refused to pay the same to plaintiff, and still refuses so to do. Wherefore plaintiff prays judgment against the defendant for the sum of seven thousand five hundred dollars, and interest until paid, together with costs and disbursements.

D. G. FOWLE,
Att'y for Plaintiff.

STATE OF MARYLAND, } ss:
City of Baltimore, }

On this, the 24th day of November, 1883, before me, Rob't Lyon Rogers, a commissioner of the United States in and for the district of Maryland, personally appeared John Glenn, trustee, the plaintiff above named, and made oath in due form of law that the facts set forth in the above complaint as of his own knowledge are true, and that those stated upon information and belief he believes to be true.

(S'g'd) JOHN GLENN.

Sworn and subscribed before me this the 24th day of November, 1883.

[SEAL.] (S'g'd) ROB'T LYON ROGERS,
U. S. Commissioner for Maryland.

Endorsed: Complaint. Filed November 27, 1883. N. J. Riddick, clerk. By Vitruvius Royster, deputy clerk.

14 And at said term, upon motion of defendant's counsel, Walter Clark and Battle & Mordecai, time was granted the defendant to answer or demur.

Time to Answer or Demur.

Time till February 1, 1884, allowed the defendant to answer or demur.

And this cause is continued.

And afterwards, to wit, on January 28, 1884, the defendant, the said William J. Hawkins, by his attorneys, Walter Clark and Battle & Mordecai, comes and files his answer as follows:

Answer.

UNITED STATES OF AMERICA:

Circuit Court, 4th Circuit, Eastern Dist. of N. C. Nov'r Term, 1883.

JOHN GLENN, Trustee of the National Express & Transportation Company,
against
WILLIAM J. HAWKINS.

The defendant answers to the complaint:

First. For a first defense—

I. That allegations of article I thereof are true.

15 II. That, according to his information and belief, he does not owe the plaintiff as alleged in article II of the complaint; that it is true that about the time mentioned in that article he subscribed for 250 shares of stock in said company, but he saith that for

two hundred of said shares he subscribed for other persons than himself, and for them he took from said company four certificates for fifty shares each. One of these certificates for fifty shares was very soon transferred to Bailey P. Williamson, for whom it had been taken, and in lieu of it a new certificate for these fifty shares was issued by said company, and, as the defendant is informed, the transfer made on the books of the company; and the defendant saith that the said Williamson, then and now a citizen of Raleigh and said State of North Carolina, was then & has since continued to be perfectly solvent. Another of said four certificates was assigned by the defendant to Jonathan M. Heck & a third to Kemp P. Battle, both then citizens of said city of Raleigh and perfectly solvent. These transfers were made very soon after said certificates were issued to the defendant and had been taken by him for said Heck and Battle, respectively, and it was understood that the certificates were to be taken to the office of the company and the transfer made on the books of the company. Whether this was done the defendant has no knowledge or information sufficient to form a belief. The
16 fifty shares represented by the fourth certificate were about the same time transferred in lots of ten shares each to Jacob Parker, R. T. Arrington, Joseph B. Batchelor, N. R. Jones, and Dr. Geo. H. Thomas, all then solvent citizens of said State of North Carolina; but he doth not know whether certificates for their shares were issued to them. He saith, further, that as to the fifty shares he retained he paid such assessments as were required of him during the short time said company did business, for payment of its liabilities and expenses, and he believes that like assessments were paid upon all of the said other two hundred shares; and he denies that he owes anything on account of any of said shares.

III. That he is informed that said company executed what purported to be an assignment for the purposes alleged in article III of the complaint, but whether it had the power to make such assignment or what was its legal effect, if any, he has no knowledge or information sufficient to form a belief.

IV. That he has no knowledge or information sufficient to form a belief as to the allegations in articles IV, V, & VI, respectively; but this defendant is informed and believes that proceedings are now pending in the said cause upon the petitions of J. A. Trotter & others and of Thos. L. Farish and others to set aside any decree or decrees that have been rendered in said cause.

V. That it is untrue that he promised to pay the plaintiff,
17 as alleged in article VII of the complaint, and he has no knowledge or information sufficient to form a belief as to the other allegations of said article VII.

Second. For a second defense—

I. That, denying any promise on his part to pay the plaintiff as aforesaid, he saith that he is advised that the plaintiff is not the proper plaintiff in this action, as appears from the other allegations of the complaint, and that he cannot recover in this action.

Third. For a third defense—

I. That while, as appears from the complaint, it is claimed that

the defendant and all the other shareholders in said company are jointly liable to pay assessments on their stock *pro rata* for the purpose of creating a fund for the satisfaction of the alleged debts of said company, the plaintiff, as the defendant is informed and believes, has accepted from others of said shareholders a smaller per centum than he is now seeking to exact from the defendant, to wit, 25 per centum, in full discharge of their liability for their respective subscriptions, and has released them respectively by deed in respect thereto; and the defendant is advised that in no event can there be recovered from him a larger per centum than that so taken from said other shareholders.

Fourth. For a fourth defense—

I. That the plaintiff's cause of action did not accrue within three years before the commencement of this action.

(S'g'd) CLARK AND BATTLE & MORDECAI,
Deft's Att'ys.

18 W. J. Hawkins makes oath that the foregoing answer is true of his own knowledge, except as to matters stated therein upon information and belief, and as to them he believes it to be true.

(S'g'd) W. J. HAWKINS.

Sworn & subscribed before me this 28th day of Jan'y, 1884.
VITRUVIUS ROYSTER, *Deputy Clerk.*

(Endorsed:) Answer. Filed Jan'y 28, 1884. N. J. Riddick, clerk, by Vitruvius Royster, deputy clerk.

Proceedings at June Term, 1884.

At this term the case is continued and further day is given the parties.

November Term, 1884.

At this term come the parties aforesaid, and the case is again continued and further day given the parties.

Proceedings at June Term, 1885.

19 And now, at a term of the circuit court of the United States for the eastern district of North Carolina, begun and held at the court-rooms of said court, in the city of Raleigh, in said district, on the first Monday in the month of June, A. D. 1885, the Honorable Hugh L. Bond and the Honorable Augustus S. Seymour, judges presiding, come the parties aforesaid, with their attorneys aforesaid, and, this cause being called for trial, the defendant, by leave of the court, files an amendment to his answer in the words and figures following, to wit:

Amendment to Answer.

First defence, second item, third line, beginning "That it is true," &c.—for that passage substitute as follows:

That it is true that about the time mentioned in that article he subscribed for 250 shares of stock under the following circumstances: Acting as agent for Jonathan M. Heck, K. P. Battle, & B. P. Williamson, he proposed to the agent of a projected company, to be known as the National Express Company, which afterwards became the National Express & Transportation Company, to take for these persons severally fifty shares in such last-named company, and that at the suggestion of said agents and for their convenience such shares, as well as one hundred additional shares which this defendant proposed to take for himself, were expressed upon the book in which such subscription was entered as taken by this defendant, it being understood, however, as above, that the 150 shares taken as
20 above for Heck, Battle, & Williamson were in fact their property and not that of this defendant; that subsequently thereto and after the granting of a charter to the National Express & Transportation Company at the time when the stock so as above subscribed for was being taken into such last-named company this defendant again represented to the officers of the National Express & Transportation Company in charge of such transactions that the facts and interest and liabilities of the parties above named were as follows, viz: Heck, 50 shares; Battle, 50 shares; Williamson, 50 shares, and this defendant, 100 shares; and that certificates of stock and entries upon the books of the last-named company should be made accordingly, but that said officers again represented that, as matter of convenience and conformity, the certificates should be issued to him, although for amounts corresponding to his representations as to the rights of his principals, the last 100 shares being also subdivided, inasmuch as this defendant did not propose to keep as an investment more than fifty shares, supposing that he knew of parties who would take the other fifty of such one hundred; and that accordingly such officers transmitted to this defendant after his return to North Carolina certificates for the whole 250 shares, in five certificates of 50 shares each, 150 of which he at once transferred to the persons whose names had been given to the agents of the two companies as above, this defendant having, as was known to said companies as above, never intended to own or to be liable on
21 behalf of said 150 shares, and such companies having all the while been informed of and assenting, as above set forth, to such intention.

(S'g'd) W. J. HAWKINS.

Sworn and subscribed before me June 6, 1885.

V. ROYSTER,
Deputy Clerk, U. S. Circuit Court.

Endorsed: Amendment to answer. Filed June 6, 1885. N. J. Riddick, clerk, by V. Royster, deputy clerk.

Trial and Jury.

And thereupon, on the day and date last above mentioned, to wit, June 6, A. D. 1885, the following jurors, to wit, Hugh Blalock, J. C. Jordan, Sion Harrington, J. S. Harrington, W. B. Hutchings, Thomas Bennett, Len. H. Adams, James S. Hailey, John M. Martin, W. T. Howle, W. C. Coates, and Junius Adams, being chosen, sworn, and empanelled to try the issues joined between the parties, for their verdict say that they find all the issues in favor of the plaintiff and assess his damages at the sum of $9,508.75, of which $7,500.00 is principal and bears interest from June 1, 1885.

22 And thereupon judgment is rendered by the court and entered of record in the words and figures as follows:

Judgment.

In the United States Circuit Court for the Eastern District of North Carolina. June Term, 1885.

JOHN GLENN, Trustee of the National Express and Transportation Company,

vs.

W. J. HAWKINS.

This cause being tried by a jury and all the issues being found in favor of the plaintiff, and the jury having assessed plaintiff's damages at the sum of nine thousand five hundred and eight dollars and seventy-five cents ($9,508.75), with interest on the sum of seven thousand five hundred dollars from the 1st day of June, 1885, upon a contract executed by the defendant, W. J. Hawkins, on the 1st day of November, 1865:

It is ordered and adjudged by the court that the plaintiff

23 recover of the defendant the sum of nine thousand five hundred and eight dollars and seventy-five cents ($9,508.75), with interest on the sum of seven thousand five hundred dollars from the first day of June, 1885, until paid, together with costs.

(S'g'd) AUG. S. SEYMOUR,
U. S. Judge.

Endorsed: Filed June 6, 1885. N. J. Riddick, clerk, by V. Royster deputy clerk.

And afterwards, to wit, on the 19th day of October, 1885, before his honor Aug. S. Seymour, judge, an order setting aside said judgment, &c, is made and entered of record, and judgment is again entered in said cause; which said order and judgment are in the words and figures following, to wit:

24 Circuit Court of the United States, Eastern District of North Carolina. June Term, 1885.

JOHN GLENN, Trustee, &c., *against* WILLIAM J. HAWKINS.

Upon motion made before me, one of the judges of said court, at Raleigh, on Monday, the 19th October, 1885, in behalf of the defendant, that the judgment rendered in this action be set aside, I find the following as facts:

That upon the rendition of said judgment the counsel for the defendant tendered me a bill of exceptions as the foundation of a writ of error to the Supreme Court of the United States for my signature; that for the convenience of the court and of the plaintiff's counsel I directed the clerk to hand said bill to the counsel for plaintiff for amendments or suggestions, and that a counter-bill, by way of amendment to that prepared for appellant, was handed to appellant's counsel some time in the month of September and transmitted to me with the proposed bill prepared for appellant about the 1st of the present month of October. I find further that said term of the court was not adjourned, but, as the practice is in this district, was left open for the purpose, among others, of perfecting appeals, &c.

25 Upon these facts and in order that the appellant may not lose his right to a supersedeas by filing a proper bond and suing out his writ of error, it is ordered and adjudged that said judgment be set aside.

(S'g'd) AUG. S. SEYMOUR,
U. S. Judge.

Endorsed: Order setting aside judgment, &c. Filed October 19th, 1885. N. J. Riddick, clerk, by V. Royster, deputy clerk.

Judgment.

Circuit Court of the United States, Eastern District of North Carolina. June Term.

JOHN GLENN, Trustee of the National Express & Transportation Company,
vs.
WM. J. HAWKINS.

The jury having found the issues in this action in favor of the plaintiff and assessed his damages at nine thousand five hun-

26 dred & eight $\frac{75}{100}$ dollars, of which $7,500 is principal money:

Hereupon it is adjudged that the plaintiff recover of the defendant the said sum of $9,508.75, with interest on $7,500 from June 1st, 1885, and his costs of suit to be taxed by the clerk.

Oct. 19th, 1885.

(S'g'd) AUG. S. SEYMOUR,
U. S. Judge.

Thereupon the defendant gives notice that he will apply for a writ of error and supersedeas, and tenders a bill of exceptions.

Bond for supersedeas is fixed at twenty thousand dollars ($20,000).

Oct. 19th, 1885.

(S'g'd) AUG. S. SEYMOUR,
U. S. Judge, &c.

And thereupon, to wit, on the said 19th day of October, 1885, the said defendant, by his attorneys aforesaid, comes and files bill of exceptions as signed, sealed, and allowed to him; which said bill of exceptions with Exhibit "A" filed therewith as part thereof are in the words and figures as follows, to wit:

27 In the Circuit Court of the United States for the Eastern District of North Carolina. June Term, 1885.

JOHN GLENN, Trustee, &c., *v.* WM. J. HAWKINS.

Be it remembered that on the trial of this cause, after the jury had been sworn to try the issues joined, the plaintiff, to maintain his case, introduced evidence tending to show that in March, 1861, a corporation had been chartered by the Legislature of the State of Virginia to be known as the Southern Express Company, but that no organization was had thereunder; that in September, 1865, a number of citizens of Virginia and other States met in the city of Richmond, Va., and proposed to adopt the said charter as the basis of action for the formation of a new and larger enterprise of the same kind, and under an amended charter changed name to be substituted therefor to do an express business throughout the country; that accordingly, in November, 1865, large subscriptions having been made to the capital stock in many States, a provisional organization was effected in which the defendant Hawkins was named as one of the directors, and the business of the company was commenced and actively prosecuted; that on the 12th day of December, 1865, a new and amended charter was granted by the Legislature of Virginia for a company to be known as the "National
28 Express and Transportation Company," the defendant Hawkins being named therein as one of the corporators; that the capital stock was authorized to be five millions dollars (with power in the directory to increase it to $10,000,000), divided into shares of $100.00 each, of which a part was payable at the time of subscribing and the balance as called for by the president and directors; that in January, 1866, the provisions of the charter having been complied with, this corporation was duly organized, the defendant Hawkins being one of the directors; that the said company adopted and continued the business of the said provisional organization and extended its operations through many States; that in September, 1866, having contracted many debts in said States and finding itself much embarrassed, it executed a deed of assignment conveying and assigning in trust to trustees for the benefit of all of its creditors all of its property, including the unpaid subscriptions to the capital stock, of which only twenty per cent. had been called for by the president

and directors; that on the 1st November, 1866, the trustees under the assignment took possession of the assets of the company and the business of the company ceased; and then, to show his right and authority to sue for an assessment of thirty per cent. made by the chancery court of the city of Richmond (as set forth in his declaration or complaint) upon the stockholders of said company, the plaintiff introduced in evidence the transcript of the record of the proceedings of said court hereto attached, marked "A," as part
29 of this bill of exceptions in a certain suit therein then pending, known by the short title of "W. W. Glenn's administrator & others *v.* The National Express Company & others," in which, upon a general creditors' bill brought in 1871 by the creditors of said company against the said company & its president and directors and the surviving trustees in said deed of assignment, the said court had, by a decree entered on the 16th day of December, 1880, adjudicated the indebtedness of the said company, the said assignment to be a conveyance of the unpaid subscriptions for the payment of the same, the necessity and propriety of an assessment of thirty per cent. upon the unpaid subscriptions for the payment of the said indebtedness, and the substitution of the plaintiff as trustee to receive and collect the said assessment.

And then the plaintiff introduced in evidence the stock books of said company showing the following entries as to the defendant Hawkins:

	To whom transferred.	Transfer No.	Certificate No.	No. of shares.	Requisition drawn.		From whom transferred.	Certif. No.	No. of shares.	Requisition paid.
1866.						1865.				
Feb'y 5	M. Bowes	436	302	10	50	Nov. 1	Company.	299 to 303	250	$1,250
" "	Geo. B. Waterhouse	437	302	10	50					
" "	B. P. Williamson	438	302	10	50					
" "	R. H. Battle, Jr.	439	302	10	50					
" "	Wm. E. Anderson	440	302	10	50					

WILLIAM J. HAWKINS,
RIDGEWAY.

And then the plaintiff rested his case.

And then the defendant, to maintain his case, took the
30 stand and testified as follows: That he, the defendant, then and ever since a citizen of North Carolina, subscribed for two hundred and fifty shares, of one hundred dollars each, under the following circumstances:

At the instance of three other citizens of North Carolina having ample means therefor, viz., K. P. Battle, J. M. Heck, & B. P. Williamson, he went to Richmond, in the fall of 1865, and proposed to the parties then and there superintending the reception of subscriptions upon behalf of the projected company to take fifty shares each for the persons so authorizing him as above, there named by him, and also one hundred shares for himself, having in contemplation

other parties not then communicated with who might wish to take fifty shares of this one hundred; that after some conversation the superintendent suggested that for some formal reason it would be more convenient to place the name of Hawkins only upon the books as subscriber for the whole two hundred and fifty shares; that this was accordingly done, the initials of the three persons, his principals as above, being at the same time endorsed as a memorandum upon the subscription paper; and that in January, 1866, when the company was organized, he, the defendant, being one of the directors upon that occasion, informed the board of directors of the terms of his subscription, as above, and that no objection was made thereto; that he also instructed the officer of the company whose business it was to issue certificates of stock to issue five for fifty shares
31 each, three of these in the names of the parties mentioned as above and there repeated and two to himself; that at the same time he paid two hundred and fifty dollars which had been assessed upon the two hundred and fifty shares, one hundred and fifty of which he had received from such principals, and that he receipted for such certificates upon the books of the company, his receipts taking no notice of the persons upon behalf of whom any part of it was issued; that shortly afterwards the five certificates were transmitted to him in North Carolina by express, all five being made out in his name only; that he did not return either of them to the company, but immediately transferred each of the three in question to the party for whom it was intended, and only one of the certificates was ever transferred upon the books of the company; and there the defendant rested his case.

And this being all of the evidence in the case the plaintiff asked the court to instruct the jury to find for him, which the court refused to do, but instructed the jury that if they believed the evidence they must find for the plaintiff; to which instruction the defendant then and there excepted, and prays that this bill of exceptions may be allowed to him and signed, sealed, and enrolled of record, which is accordingly done in term time.

AUG. S. SEYMOUR, [SEAL.]
U. S. Judge.

32 EXHIBIT "A." Filed as Part of Bill of Exceptions.

VIRGINIA:

In the Chancery Court of the City of Richmond.

W. W. GLENN'S ADMINISTRATOR, &c.,
v.
THE NATIONAL EXPRESS AND TRANSPORTATION COMPANY and Others.

Pleas before the judge of chancery court of the city of Richmond.

Be it remembered that heretofore, to wit, on the 28th day of November, 1871, came the plaintiff, W. W. Glenn, suing on his own

behalf and of such other creditors of the National Express and Transportation Company as may become parties to this suit and contribute to the expenses thereof, by counsel, and sued out of the clerk's office of the chancery court of the city of Richmond subpœnas in chancery against the defendants, William H. Perot, president of said company; William Davies, D. J. Foley, M. G. Harman, Joseph R. Anderson, F. P. Zimmerman, J. Carter Mowbray, William H. Webb, Lorenzo Norvell, John Blair Hoge, C. Oliver O'Donnell, and John J. Kelly, directed to the sheriffs of the city of Richmond and town of Staunton, and returnable to 1st December rules, 1871; which subpœnas in chancery and returns of the sheriffs thereon are in the words and figures following, to wit:

Subpœnas.

The Commonwealth of Virginia to the sheriff of the city of Richmond, Greeting:

We command you that you summon William H. Perot, president of said company; William Davies, D. J. Foley, M. G. Harman, Joseph R. Anderson, F. P. Zimmerman, J. Carter Mowbray, Wm. H. Webb, Lorenzo Norvell, John Blair Hoge, C. Oliver O'Donnell, and John J. Kelly to appear at the clerk's office of the court of chancery of the city of Richmond, at the rules to be held for
33 the said court on the first Monday in December, 1871, to answer a bill in chancery exhibited against them in our said court by W. W. Glenn, suing on his own behalf and of such other creditors of the National Express and Transportation Company, a company chartered and incorporated under the laws of the State of Virginia, as may become parties to this suit and contribute to the expenses thereof; and have then there this writ.

Witness Benjamin H. Berry, clerk of our said court, at the courthouse, the 28th day of November, 1871, and in the 96th year of our foundation.

BENJ. H. BERRY.

Return.

Executed on Joseph R. Anderson November 25th, 1871, by delivering him a true copy of the within spa. in chan.; the others not found.

BENJ. T. AUGUST, *D. S.*,
For JOHN W. WRIGHT, *S. C. R.*

Executed in the city of Richmond, said Anderson being a resident of said city.

The Commonwealth of Virginia to the sheriff of the town of Staunton, Greeting:

We command you that you summon W. G. Harman to appear at the clerk's office of the court of chancery of the city of Richmond, at the rules to be held for the said court on the first Monday in De-

cember, 1871, to answer a bill in chancery exhibited against him and others in our said court by W. W. Glenn, suing in his own behalf and of such other creditors of the National Express and Transportation Company, a company chartered and incorporated under the laws of the State of Virginia, as may become parties to this suit and contribute to the expenses thereof; and have then there this writ.

Witness Benjamin H. Berry, clerk of our said court, at the courthouse, the 28th day of November, 1871, and in the 96th year of our foundation.

BENJ. H. BERRY.

Return.

Executed December 4th, 1871, as to M. G. Harman by leaving at his residence, in the city of Staunton, with a white member of his family over sixteen years of age a copy of this "chy. spa.,"
34 explained its purport, and requested that the same be handed to said M. G. Harman on his return, he being from home at the time.

W. L. MAURY, *S. A. Co.*

And at another day, to wit, at rules held in the clerk's office of the chancery court of the city of Richmond on the first Monday, being the 4th day, of December, 1871, came the plaintiff and filed his bill; which bill and exhibits therewith are in the words and figures following, to wit:

Bill.

W. W. GLENN

vs.

THE NATIONAL EXPRESS AND TRANSPORTATION COMPANY and Others.

To the Honorable Edward H. Fitzhugh, judge of the chancery court of the city of Richmond:

Humbly complaining, showeth unto your honor your orator, William W. Glenn, of Baltimore city, who files this bill on behalf of himself and such other creditors of the National Express and Transportation Company as may become parties to this suit and contribute to the expenses thereof, that your orator is a creditor of the National Express and Transportation Company to the amount of $42,501.31, with interest thereon from the 24th day of June, 1870, for which sum your orator recovered a judgment against said company in the superior court of Baltimore city on the 24th day of June, 1870, as will appear by a short copy of said judgment herewith filed and made a part of this bill, marked Complainant's Exhibit W. W. G. No. 1, and full transcript of which judgment your orator will produce when thereto required.

And your orator charges that said National Express and Transportation Company was duly incorporated by the Legislature of the State of Virginia on the — day of ——, 1865, as will appear from

the act of incorporation found among the printed laws of said State, to which reference is hereby made and a copy whereof will be produced when required.

And your orator further charges that said company accepted said act of incorporation and proceeded to conduct its business in pursuance thereof until the 20th day of September, 1866, when said company, having become much embar-assed in its affairs and owing large debts to various persons, executed a deed of trust for the benefit of its creditors to the defendants, John Blair Hoge, C. Oliver O'Donnell, and John J. Kelly, dated the 20th day of September, 1866, which was duly recorded in the city of Richmond, in the city of Baltimore, and elsewhere and a copy of which is
35 herewith filed and made a part of this bill, marked Complainant's Exhibit W. W. G. No. 2.

And your orator further charges that the assets of said company, to which its creditors have to look mainly for the payment of their debts, consist of the amounts contracted to be paid by the subscribers to its capital stock.

And your orator charges that the total number of shares of the stock of said company which had been subscribed for at the date of said assignment was 40,044, each share being of the par value of $100 and said subscriptions representing the large aggregate of 4,004,400, and that on the 29th day — October, 1866, the condition of said company with reference to its stock and debts was reported at a meeting of stockholders as follows:

There had then been subscribed for of the stock of said company—

557	shares on which	nothing	had been paid.		
1,154	"	"	1 per cent.	had been	paid, but no certificates issued.
2,169	shares on which	5 per cent.	had been	paid.	
20	"	"	7½	"	"
8,087	"	"	10	"	"
25	"	"	11	"	"
20	"	"	12½	"	"
250	"	"	13	"	"
12,554	"	"	15	"	"
20	"	"	15½	"	"
15,188	"	"	20	"	"
40,044	shares.				

And your orator charges that the subscribers to the capital stock of said company resided and now reside in many States and not within the jurisdiction of any one court.

And your orator further charges that by the terms of the subscription the subscribers were bound to pay the amount of said subscriptions as and when the same should be called for by said company.

And your orator further charges that the total amount of assessments or calls made by said company upon its stockholders was twenty per cent. of the amount of the subscriptions, and that the

amounts paid in money or by notes upon said calls of twenty per cent. are correctly set forth above.

And he is informed and believes, and believing charges, that a very small part, if any, of the said assessments, to the amount of twenty per cent., which remained unpaid at the date of said report has been since paid or collected from the delinquent stockholders.

36 And your orator further charges that no subsequent call or assessment was made upon its stockholders by said company, and that eighty per cent. of the amount of said subscriptions remains uncalled for and unpaid.

And your orator charges that said trustees were not requested to take possession of said trust estate under said deed until on or about the 3rd day of November, 1866, and that in the meantime nearly all of the visible property of said company had been levied upon and taken under legal process by its creditors, and that the amount of the same was wholly insufficient to pay the debts of said company.

And he further charges that said company had hypothecated or otherwise used and parted with a considerable amount of the notes and other obligations received by it from stockholders on account of amounts due by them on said calls, and he charges that the actual amount of money realized and received by said trustees under said assignment was not sufficient to pay the debts due the preferred creditors of the first class mentioned in said deed of trust.

And your orator further charges that of the amount of the said assessments upon the subscribers of twenty per cent. a large part cannot be collected at all by reason of the insolvency of the subscribers, and your orator is informed and believes, and believing charges, that a large part of said assessments has been lost by the lapse of time and cannot now be collected.

And your orator further charges that as to the debts due upon said unpaid assessments said trustees allege that they have been hindered and delayed in the collection of the same by adverse litigation in the State of Maryland and in the State of New York and in other States; and he charges that it is represented by said trustees that their right to collect the debts due the company by subscribers on said assessments has been called in question in some of the suits and the validity of said deed of trust has been disputed.

And your orator further charges that in some of said suits said trustees have been enjoined from proceeding to collect the debts due said company, and said trustees have thus far been able, as they represent, to collect very little, if any, of said debts by reason of the difficulties interposed by said litigation.

And so your orator charges that the debts due said company and which ought to be applied to the payment of its creditors are either now lost in a great part or are in danger of being lost and are not now available for the payment of said creditors.

And your orator further charges that even if said trustees can surmount the embarrassments and difficulties which they allege have prevented them hitherto from realizing said assets the

37 amount which can be realized from all the property which passed to said trustees and which could under any circumstances be realized by them would be entirely inadequate to pay the just debts of said company.

For your orator is advised and respectfully submits that by the true construction of said deed of trust no part of the eighty per cent. of subscriptions to said capital stock which had not been called for by said company from its subscribers passed to said trustees, nor any power to sue for or collect said subscription so uncalled for, but that the relations between said company and its subscribers and their legal rights and obligations as to said uncalled-for part of said subscriptions remained unaffected by said deed of trust.

And your orator is advised and respectfully submits that under said deed of trust, assuming the same to be valid, said trustees acquired no right to sue a subscriber for his subscription to said stock, except to the extent that said company could sue such subscriber, and your orator is advised and respectfully submits that said company could not sue one of its subscribers for his subscription unless and until said company has first made an assessment or call upon such subscriber therefor; and so your orator is advised and respectfully submits that allowing said deed to have full legal validity everywhere, and allowing said trustees to proceed without impediment to collect all debts due the company collectible by them, it is manifest that the provisions of said deed of trust are wholly inadequate to provide for the payment of the debts of said company, many of whose creditors your orator charges are in very needy circumstances and all of whom have waited nearly five years for the satisfaction of their just demands.

And your orator further charges that even if said company were now to levy an additional assessment upon its stockholders it is doubtful whether the right to sue for and collect such assessment would rest in said trustees under said deed, and in attempting to collect the same said trustees would meet with this additional embar-assment, besides those which they allege have attended their efforts to collect the calls already made and unpaid at the date of said deed and which were intended to be conveyed to them by said deed.

And your orator further charges that if it be held that any new call were to be made by said company would not pass to said trustees, and they would not for any reason be entitled to collect the amount thereof, but that the amount of such calls would be due to the said company by the stockholders, it would lead to ruinous and disastrous consequences, inasmuch as the creditors of said company would endeavor to reach the amounts due to said company under such additional call from its solvent stockholders, and much
38 thereof would be lost in the expenses of litigation, and an equitable and just division thereof among the creditors would be wholly defeated, as your orator further charges that a large part of the debts of said company are too small to justify the

holders of them, who are poor men, in entering upon such a race of diligence.

And your orator further charges that it will be necessary to resort to the residue of said subscriptions in order to provide the requisite means to pay the debts of said company, and he is advised and respectfully submits that said subscriptions, so far as the same are unpaid, constitute a trust fund for the payment of the debts of said company, and that the same can and ought to be collected and so applied.

And he further represents that, inasmuch as the stockholders reside within different jurisdictions, it is impossible for the creditors to make them all defendants in any one court and compel an equitable contribution from them to raise a fund sufficient to pay the debts of said company.

And he is advised that to proceed against the stockholders who are within the jurisdiction of each court would increase litigation and would lead to other injurious consequences.

For your orator is advised that should the creditors proceed against the stockholders within the jurisdiction of any one court they would be entitled to compel said stockholders to contribute to the extent of their unpaid subscriptions, without reference to the contribution that should be made by other stockholders not within said jurisdiction, and would force those so compelled to contribute to resort to stockholders elsewhere for contributions and indemnity, and thus greatly multiply litigation and expense.

And your orator is advised and respectfully submits that, in view of the difficulties and embarrassments which are alleged by said trustees to have attended their efforts to collect so much of the debts of said company as was intended to be conveyed to them by said deed of trust, and in view of the further and additional difficulties that would attend any attempt on the part of the said trustees to collect any new call to be made by said company, and in view of the ruinous expense, loss, and injustice that would attend an attempt on the part of said company to collect such new call as debts due to itself, and in view of the necessity there is that resort must be had to the subscribers to provide means for paying the debts of said company, and in view of the expense, multiplicity of litigation, and other difficulties that would attend the proceeding of the creditors against said stockholders directly in the different States and jurisdictions in which said stockholders reside, and in view of the unquestionable right of said creditors in some form to compel payment from said stockholders, the said creditors are entitled to the interposition of a court of equity for their relief.

39 And he is advised and respectfully submits that said creditors are entitled to have an account taken of the debts of said company and of the assets now available for the payment of the same other than the unpaid subscriptions, and that they are entitled to have an ascertainment of the amount of said uncalled-for and unpaid subscriptions which will be required to provide means for the payment of the debts of said company in full, and that in ascertaining the amount so required a proper allowance

should be made for probable losses by insolvency of stockheldors and otherwise and for the expenses of collecting the same and of this proceeding, and to have a decree requiring said company to make a call or assessment upon its stockholders sufficient to provide said necessary amount, and to have the debts created by such call placed in the hands of some person or persons to be appointed by this court, with adequate authority and power to sue for, collect, and receive the same and bring the same into this court to await its further order.

And your orator further charges that before the questions relating to the powers, rights, and obligations of said trustees under said deed of trust can be finally decided there is imminent danger that a large part of the said subscriptions to the stock of said company may be lost by the insolvency of the subscribers and other causes.

And he is further advised that he and the other creditors are entitled to have said deed of trust pronounced upon and construed by this court, and to have the powers and duties of the trustees thereunder and the rights of the creditors ascertained and defined.

And he is advised that, as said company is a Virginia corporation, and as said deed of trust conveys nothing but personal property, whatever force and effect may be given to the same by the law of this State will be respected and enforced in the courts of other States when said deed may be drawn in question, so far as the law of Virginia with reference to said deed may not conflict with the positive law of such other States.

And so your orator is advised and submits that he and the other creditors of said company are entitled to have the judgment of this court as to the validity and scope of said deed of trust under the laws of Virginia.

And your orator further charges that there has not been recently any election of officers by said company; but he is advised that, under its charter and the laws of Virginia, the officers of said company last elected remain such officers until the election and qualification of their successors, and are competent to exercise the power of such officers.

And he is further advised and submits that under the laws of Virginia the corporate franchises of said company and its existence as a corporation continue in full force and effect until the affairs of said company shall have been fully settled and its debts paid.

And your orator charges that William H. Perot, of Baltimore, is the president of said company, and that the board of directors thereof are William Devries and D. J. Foley, of Baltimore; M. G. Harman, of Staunton, Virginia; Jos. R. Anderson, of Richmond; F. P. Zimmerman, of Augusta, Georgia; J. Carter Mowbray, of Washington, D. C.; Wm. H. Webb, of New York city, and Lorenzo Norvell, whose residence is unknown to your orator.

The principal office of said corporation is in the city of Richmond, in the State of Virginia.

Forasmuch, therefore, as your orator and the other creditors of

said company are without remedy in the premises, save in a court of equity, and to the end that an account may be taken of the debts due by said company, and that said trustees may state what amount, if any, of money or other property they have received for the payment of the debts of said company, and what payments they have made, and what debts and other property or money belonging to said company they now hold under said deed of trust, and that an account may be taken of such available assets of said company as may now be held by said trustees and of the subscriptions yet unpaid and uncalled for and of the value thereof, and that the amount necessary to be assessed upon the solvent subscribers of said company in order to provide means for the payment of its debts and of the expenses of collecting and administering the same may be ascertained, and that said board of directors of said company may be decreed to levy an assessment or to make a call upon the subscribers for payment of a sufficient amount of their unpaid and uncalled-for subscriptions to pay the said debts and all necessary expenses in case said board of directors shall otherwise be unwilling or fail to take such account and to make such call voluntarily;

And that the validity, effect, and scope of said deed of trust may be ascertained and pronounced upon by this court, and the powers, duties, and rights of the trustees and of the creditors of said company thereunder may be ascertained and interpreted and the execution of said trust, if the same be held valid, be decreed, and that in the meantime a receiver or receivers *ad litem* may be appointed by this court, with power and authority to receive, sue for, and collect and reduce to money all debts, choses in action, and claims now in the hands of said trustees and to take possession of and sell all property vendible in its nature held by said trustees and with full power and authority to sue for, receive, and collect any moneys that may become due from any stockholders of said company upon any new or additional calls that may be made by said company upon
41 said stockholders, and that said trustees and said company may be required to execute and deliver to said receiver or receivers or trustees *ad litem* any and all assignments, deeds, and conveyances as may be necessary to vest such receiver or receivers or trustees *ad litem* with legal power and authority to sue for, demand, and receive such debts or other property of said company, or that, in case the same be necessary, *that* such receiver or receivers or trustees *ad litem* may be authorized to use the names of said trustees or of said company in prosecuting any suits or actions that may be necessary to compel payment of any debts due said trustees or said company or to reduce its property to possession, and that such receiver or receivers or trustees *ad litem* may bring into this court, to await its final order, any and all moneys received or collected by him or them under said decree or order, and that your orator and the other creditors of said company may have such other or further relief as the equity of the case may require and to your honor may seem meet, may it please your honor to grant unto your orator the writ of subpœna to the said The National Express and Transportation Company and to the officers and directors thereof above named

and to the said John Blair Hoge, C. Oliver O'Donnell, and John J. Kelly to be be directed, commanding them to be and appear in this court and answer fully in the premises and show cause, if any they have, why a decree should not be passed as prayed and your orator have the relief he seeks.

And your orator, as in duty bound, will ever, &c.

MARSHALL & FISHER,
JOHN HOWARD, *P. Q.*

COMPLAINANT'S EXHIBIT W. W. G. No. 1.

In the Superior Court of Baltimore City. May Term, 1870.

W. W. GLENN
vs.
THE NATIONAL EXPRESS AND TRANSPORTATION COMPANY.

29th April, 1869.—*Nar.*, 3 prom. notes, 3 protests, acc't, and affi't f'd. Sum'd by service on Wm. H. Perot, president.

8th June, 1869.—Judgment by default for want of plea and affidavit.

24th June, 1870.—Judgment by default extended for $42,501.31 damages assessed by the court, with int. from 24th June, 1870, and costs.

Order of court f'd.

Plaintiff's costs, $8.65; defendant's costs, $5.30.

42 STATE OF MARYLAND, } *sct:*
Baltimore City, }

I hereby certify that the aforegoing is a true short copy of the judgment in the above-entitled cause, taken from the record of the proceedings of the superior court of Baltimore city; and I hereby further certify that said record contains no proceeding or entry to show that the judgment aforesaid has been satisfied either in whole or in part.

In testimony whereof I hereto set my hand and affix the seal of the said court this 23d day of October, A. D. 1871.

[L. S.] GEORGE ROBINSON,
Clerk of the Superior Court of Baltimore City.

COMPLAINANT'S EXHIBIT W. W. G. No. 2.

This deed, made the 20th day of September, A. D. 1866, between the "National Express and Transportation Company," a body politic and corporate under the laws of the State of Virginia, of the first part, and John Blair Hoge, John J. Kelly, and C. Oliver O'Donnell, of the second part, witnesseth:

That in consideration of the trusts hereinafter declared and of one dollar paid to the said party of the first part by the said parties of the second part the party of the first — doth hereby grant, bargain, sell,

convey, assign, and set over unto the said parties of the second part all the estate, property, rights, and credits of the said party of the first part of every kind and wherever situated, in or out of the State of Virginia, including leases, horses, wagons, carts, harness, office furniture, safes, chests, fixtures, and other effects and moneys payable to the company, whether on calls or assessments on stock of the company or on notes, bills, accounts, or otherwise, which property and moneys are enumerated and set forth in a schedule to be marked A, and annexed hereto, as soon as can be conveniently done, but the omission of any property, money, or other thing from such schedule is not to prevent the same from being hereby granted or assigned; but this deed is made on the following trusts—that is to say:

First. That the said parties of the second part, hereinafter called the trustees, shall permit the said party of the first part to remain in the possession and use of all the property herein granted or assigned, except debts, claims, and moneys payable until the first day of November, A. D. 1866, and thereafter, until the trustees shall be requested by one or more of the creditors hereby secured, and whose debt or debts shall then be due, to take possession of such property; but the trustees shall take possession thereof at any time
43 after the date of this deed, if requested so to do by the board of directors of said party of the first part.

Secondly. That the trustees shall proceed without unnecessary delay to collect all the debts, claims, and moneys payable which are hereby granted or assigned.

Thirdly. That as soon as the trustees shall be authorized under the foregoing provisions to take possession of the other property hereby granted or assigned they shall take possession thereof and sell the same at public or private sale in such manner as they shall deem best for ready money or on reasonable credit with good security.

Fourthly. That the trustees shall have authority to employ, at the expense of this trust, such agents, clerks, counsel, attorneys, and servants as they shall deem necessary for the proper execution of the trusts of this deed and to incur such other reasonable expenses as they shall deem necessary for that purpose.

Fifthly. That out of the moneys which shall arise or come to the possession of the trustees under or by virtue of this deed they shall pay first the expenses of this trust, including the cost of preparing, stamping, and recording this deed, and a commission of five (5) per cent. to the trustees on the money received, and next they shall pay all debts now due or which shall become due from the said party of the first part to its officers and employees for their services as such on or before the first day of November next or such previous time as the trustees are required to take possession of all the property hereby granted as aforesaid.

Sixthly. Out of the remainder of such moneys the trustees shall next pay in rateable proportion the two debts which it now owes, one to the Baltimore and Ohio Railroad Company and the other to the Bank of Commerce (of Baltimore), the same being the principal

debts due by the said party of the first part, but the precise amounts of which cannot now be exactly stated.

Seventhly. That out of the remainder of such moneys the trustees shall pay all debts of the said party of the first part for which any officer or director of the company is now liable as indorser or surety for the said party of the first part.

Eighthly. That out of the remainder of such moneys the trustees shall pay in rateable proportion the balance of all debts for which the said party of the first part shall become liable to any railroad companies for transportation of express matter after the date of this deed and on or before the first day of November next, after first applying to said debts the net proceeds according to the said party of the first part from such transportation, such net proceeds being what may remain of the compensation received for such transportation after paying the current expenses of the business, and notwithstanding anything hereinbefore contained the said
44 party of the first part shall have a right to receive all tolls and compensations accruing for the transportation of express matter not yet delivered to consignees or not yet transported, although under existing contracts.

Ninthly. That out of the remainder of the moneys which shall arise and come to the possession of the trustees under this deed they shall pay (so far as such remainder shall be sufficient) all other debts and liabilities of the said party of the first part now existing in rateable proportion, so far as such debts and liabilities shall be made known to the trustees within ten months after the date of this deed, or before they shall have distributed any money under this ninth clause.

Tenthly. That any moneys remaining in the hands of the trustees herein named after satisfying the foregoing trusts shall be paid to said party of the first part.

In testimony whereof Joseph E. Johnston, president of the said National Express and Transportation Company, by virtue of authority in him vested by an order and resolution of the board of directors of said company, hath affixed the common seal of said corporation to this deed as the act and deed of said corporation, and as evidence thereof he also subscribes his name hereto the day and year above written.

[L. S.] J. E. JOHNSTON,
President, &c.

CITY OF RICHMOND, *State of Virginia:*

I, Roger J. Page, a notary public for the corporation aforesaid, in the State of Virginia, do certify that Joseph E. Johnston, president of the National Express and Transportation Company, whose name is signed to the writing above, bearing date September 20th, 1866, has acknowledged the same before me in my corporation aforesaid.

Given under my hand this 20th day of September, A. D. 1866.

(Signed) ROGER J. PAGE, *N. P.*
(Signed) J. E. JOHNSTON.

CITY OF RICHMOND, *To wit:*

In the office of the court of hustings of the said city the 21st day of September, 1866—

This deed was presented and, with the certificate annexed,
45 admitted to record at forty-five minutes past six o'clock p. m.

Teste: RO. HOWARD, *Clk.*

A copy.

Teste: BENJ. H. BERRY,
Clk Ch'y C't, Richmond.

I, Samuel M. Evans, clerk of the circuit court of Baltimore city, do certify that the aforegoing is truly copied from the original filed in said cause.

In testimony whereof I hereunto set my hand and affix the seal of the said court this 16th day of February, A. D. 1867.

[L. S.] SAMUEL M. EVANS, *Clerk.*

And the subpœnas having been returned executed on Jos. R. Anderson and M. G. Harman, it was ordered that unless they should appear at the then next rules and plead, answer, or demur to the plaintiff's bill the same would be taken for confessed as to them and the matters thereof decreed accordingly; and the cause was continued for directions as to the other defendants.

And at another day, to wit, at rules held in the clerk's office of the said court on the last Monday in December, 1879.

The defendants, Jos. R. Anderson and M. G. Harman, still failing to appear, plead, answer, or demur to the plaintiff's bill, the bill was taken for confessed, and, on motion of the plaintiff's counsel, the cause was set for hearing as to them and continued for directions as to the other defendants.

And at another day, to wit, on the 4th day of August, 1879, came the plaintiff, by counsel, and filed his amended and supplemental bill; which bill and the exhibits therewith are in the words and figures following, to wit:

Amended and Supplemental Bill.

In the Chancery Court of the City of Richmond.

JOHN W. WRIGHT, Sheriff, &c., and Adm'r of W. W. Glenn, who Sued, &c.,

vs.

THE NATIONAL EXPRESS AND TRANSPORTATION COMPANY.

RICHMOND, VA.

By way of amendment and supplement to the original bill
46 heretofore filed in this honorable court in the above-entitled cause by William W. Glenn, now deceased, in behalf of him-

self and other creditors of the National Express and Transportation Company against the said company and others, John W. Wright, sheriff of the city of Richmond aforesaid, and as such administrator in Virginia of the estate of the said William W. Glenn, dec'd (the said suit having been revived and ordered to proceed in the name of said Wright, sheriff and administrator as aforesaid), respectfully states and charges that the said judgment mentioned and set forth in said original bill as having been obtained by the said Glenn against the said company is still unsatisfied, and that neither the said company nor any of its officers or agents has made any effort to satisfy or done anything looking to the satisfaction of the same, in whole or in part. On the contrary, alike the said company, its officers and agents, and its trustees, the said John Blair Hoge, J. J. Kelly, and C. Oliver O'Donnell, have neglected, failed, and refused to take any step towards the satisfaction and payment of said debt. Meanwhile many of the stockholders of said company have become insolvent or bankrupt and others have departed this life leaving their estates in confusion, and all of the reasons which originally made it proper for this court to grant the relief prayed for in said bill now exist with greatly increased strength and urgency. Indeed, instead of doing their duty in the premises, the said company and its said trustees have rather set the creditors at defiance than made any effort to pay the corporate debts, and alike by their delay and non-action and by their obstruction of action on the part of the creditors, including the said W. W. Glenn, have seriously imperilled the payment of said debts.

The books of the said company are in the possession of said trustee, John J. Kelly, who was the last superintendent of the company, and he both refuses to submit them to the inspection of the creditors of the company and to allow copies to be made for their use; but a copy has now been obtained of the list of stockholders, and if the original books cannot be obtained your complainant is advised that this copy may be used in the case. It will be produced and filed in this cause when needed or required.

The said John Blair Hoge and John J. Kelly, trustees in said deed of trust, are non-residents of this State. Said C. Oliver O'Donnell, who was the other trustee in said deed, is dead, and his estate has been committed to the sheriff of the said city of Richmond, who, by statute in such case made and provided, may, as his personal representative, execute, so far as said O'Donnell is concerned, the trusts of said deed, or this honorable court may appoint another trustee or trustees, if necessary, in the place of the said O'Donnell and of the said John Blair Hoge and John J. Kelly, who refuse or fail to act,
47 and who are out of the jurisdiction of the court; for your complainant is advised and insists that the trusts of said deed, whatever they may be, will not be permitted to fail because either of the absence, non-residence, recusancy, death, or other default or disability of said trustees, or of any of them, and that if necessary or proper for the protection and realization of the rights of the creditors of said corporation, all of the propery and estate of every kind of the said corporation, which has long ceased to exercise its fran-

chises or to do business, will, as a trust fund for the payment of the corporate debts, be directed to be conveyed (by a commissioner appointed for that purpose) either to a new trustee *eo nomine*, or to such receiver or receivers as the court may appoint, who shall be clothed with full powers to collect all the assets of the corporation, and be required to bring the proceeds into court for the satisfaction of the corporate creditors.

And your complainant is further advised and insists that if upon due requirement thereto the said company should further fail to make such assessment upon its stockholders as may be necessary to pay its corporate debts, it will be within the rightful jurisdiction and province of this honorable court, in furtherance of justice, to order and require such assessment to be made under its direction by one of its master commissioners, or otherwise, and the said assessment to be collected by due legal process and applied to the payment of said debts.

Your complainant is advised that such a course is within the legitimate jurisdiction and established practice of a court of equity, and certainly the circumstances of this case call strongly for the vigorous exercise of all necessary powers of remedial relief.

Said corporation, national in name, but Southern in its origin and affinities, set out on its career in the fall of 1865 with the most brilliant and ambitious prospects. By many, perhaps by most, indeed, who subscribed for its stock, it was thought to be a great money-making scheme, and it did not hesitate to incur a large indebtedness in the establishment and carrying on of its business. This, in great part, it was enabled to do by the warm sympathy, good wishes, and hearty co-operation of many of the worthiest, most intelligent, and patriotic citizens and institutions of the land, from whom it received encouragement and credit in a liberal manner. And such, in fact, was the reality and the promising outlook of its large and prosperous business that, as appears by the said original bill, only a small part of the subscriptions to the capital stock was called for or paid in. But by the most unbusinesslike and culpable negligence and mismanagement the great and useful enterprise was suffered to fall through in November, 1866, and its numerous friends and creditors—many of them creditors because friends—were left in the lurch, and have been permitted to remain so ever since; nay, while
48 the company has, as above stated, itself done nothing towards the payment of its debts, but the execution of the deed of trust aforesaid, the said trustees in said deed have wholly failed and refused to execute the provisions of said deed, though often requested thereto by the said W. W. Glenn and other creditors of the said company.

Among the claims against the said company it is believed that there are none more meritorious than that of the said Glenn, which is for money paid as endorser for said company and for money lent, &c. Your complainant herewith files a complete transcript of the record in the case of the said Glenn against the said company in the superior court of Baltimore city, in the State of Maryland, in which the said judgment mentioned in the said original bill was

obtained, which transcript is marked " R," and is prayed to be taken as part of this amended and supplemental bill. The said judgment, as will be seen by an inspection of said record, was founded upon three several negotiable notes, made by the said company and endorsed and paid by the said Glenn after due protest of the same, and an account for money lent, &c., which said notes and account are duly set forth in said transcript, and proof of which said original causes of action will be furnished if required.

In consideration whereof your complainant prays that the said National Express and Transportation Company and the other persons mentioned as parties defendant in said original bill (with the exception of the said M. G. Harman, who is dead), namely, William H. Perot, of Baltimore, Maryland, president of said company; William Devries and D. J. Foley, of Baltimore, Maryland; Joseph R. Anderson, of Richmond, Virginia; F. P. Zimmerman, of Augusta, Georgia; J. Carter Mowbray, of Washington, D. C.; William H. Webb, of New York, and Lorenzo Norvell, of Lynchburg, Virginia, who are directors of said company; M. B. Poiteaux, of Richmond, Virginia, cashier and treasurer of said company, and John Blair Hoge, of West Virginia, and John J. Kelly, of New York, surviving trustees in said deed of trust in the proceedings mentioned, and, if deemed necessary or proper, John W. Wright, sheriff of the city of Richmond, and as such administrator of said C. Oliver O'Donnell, dec'd, late one of the trustees in said deed, may be made parties defendant to this amended and supplemental bill, the said non-residents of the State of Virginia, by an order of publication duly made, and may be required to answer the same and said original bill; that the said claims of the said W. W. Glenn and other creditors of said company may be established and decreed to be paid; that all of the prayers in said original bill contained may be granted as if the same were herein repeated; that the said trustees, John Blair Hoge and J. J. Kelly, may be required to deliver up and surrender to this court all of the books of said com-
49 pany of every kind and description that came into their hands or into the hands of either of them; that the said trustees be removed from office and, if necessary, another trustee or other trustees may be substituted in their place and stead and the property and estate embraced in said deed of trust be conveyed to such substituted trustee or trustees or to such receiver or receivers as may be appointed by the court; that all proper process may issue; that all proper orders and decrees may be made, and that all such other further and general relief may be granted to your complainant and to the other creditors of the said National Express and Transportation Company as the nature of the case may require and to equity may seem meet; and he will ever pray, &c.

JOHN HOWARD, *P. Q.*

EXHIBIT "R" WITH AMENDED AND SUPPLEMENTAL BILL.

STATE OF MARYLAND, *City of Baltimore,* } *sct:*

At a session of the superior court of Baltimore city, in the eighth judicial circuit of the State of Maryland, begun and held at the court-house, in the city of Baltimore, in and for the city aforesaid, on the second Monday of May (being the ninth day of the same month), in the year of our Lord one thousand eight hundred and seventy—present, the Honorable George W. Dobbin, associate judge of the supreme bench of Baltimore city, assigned to and presiding in the superior court of Baltimore city; Augustus Albert, Esq., sheriff; George Robinson, clerk—among other were the following proceedings, to wit:

WILLIAM W. GLENN, Plaintiff,
vs.
THE NATIONAL EXPRESS AND TRANSPORTATION COMPANY, Defendant.

Be it remembered that heretofore, to wit, on the twenty-ninth day of April, in the year of our Lord one thousand eight hundred and sixty-nine, the said William W. Glenn, by Charles Marshall and William A. Fisher, Esqrs., his attorneys, prosecuted and sued forth out of the court here the writ of the State of Maryland of summons, directed to the sheriff of Baltimore city, in the words and of the tenor following, to wit:

50 *Writ of Summons.*

[L. S.] BALTIMORE CITY, *To wit:*

State of Maryland to the sheriff of Baltimore city, Greeting:

You are hereby commanded to summon The National Express and Transportation Company, a body politic and corporate of the State of Virginia, and late holding and exercising franchise in the State of Maryland, of Baltimore city, to appear before the superior court of Baltimore city, to be held at the court-house, in the same city, on the second Monday of May next, to answer an action at the suit of William W. Glenn, and have you then and there this writ.

Witness the Hon'able T. Parkin Scott, chief judge of the supreme bench of Baltimore city, the 11th day of January, 1869.

Issued 29th day of April, 1869.

GEO. ROBINSON, *Clerk.*

And the said plaintiff, at the same time of bringing his action aforesaid, declared against the said defendant, and at the same time also filed therewith an affidavit with three promissory notes, three protests, and account; which declaration, promissory notes, protests, accounts, and affidavits are in the words, figures, and tenor following, to wit:

Declaration.

BALTIMORE CITY, *To wit:*

In the Superior Court of Baltimore City.

William W. Glenn, by Marshall and Fisher, his attorneys, sues The National Express and Transportation Company, late a body politic and corporate of the State of Virginia, and late holding and exercising franchises in the State of Maryland:

1. For money payable by the defendant to the plaintiff for goods bargained and sold by the plaintiff to the defendant.

2. Work done and materials provided by the plaintiff for the defendant at its request.

3. Money lent by the plaintiff to the defendant.

4. Money paid by the plaintiff for the defendant at its request.

5. Money received by the defendant for the use of plaintiff.

6. Money found to be due from the defendant to the plaintiff on accounts stated between them.

51–58 7. That the defendant, on the twenty-eighth day of April, 1866, by its promissory note, now overdue, promised to pay to the plaintiff or order $5,000, at the Bank of Commerce, Baltimore, Maryland, four months after date, but did not pay the same.

8. That the defendant, by its other promissory note, now overdue, on the ninth day of August, 1866, promised to pay to the order of Benjamin F. Ficklin $10,660.00 without offset, at the Bank of Commerce, in Baltimore, on or before the 6th day of April, 1867, and the said Benjamin F. Ficklin endorsed the same to the plaintiff, but the defendant did not pay the same.

9. That the defendant, by its other promissory note, now overdue, on the 9th day of August, 1866, promised to pay to the order of Benjamin F. Ficklin $10,843.34 without offset, at the Bank of Commerce, in Baltimore, on or before the sixth day of August, 1867, and the said Benjamin F. Ficklin endorsed the same to the plaintiff, but the defendant did not pay the same.

And the plaintiff claims $50,000.

MARSHALL & FISHER,
Attorneys for Plaintiff.

* * * * * * *

[Accompanying the said declaration were copies of the promissory notes upon which it was based, with the protests thereupon, together with an account stated of the aggregate claim of the plaintiffs, amounting at that time to $40,021.84.]

59 *Affidavit.*

STATE OF MARYLAND, *City of Baltimore,* } *To wit:*

I hereby certify that on this twenty-sixth day of April, 1869, before me, the subscriber, a justice of the peace of said State, in and for

the city aforesaid, personally appeared William W. Glenn and made oath on the Holy Evangely of Almighty God that there is justly due and owing by The National Express and Transportation Company, the defendant within named, to him, the plaintiff in this cause, on the annexed account and notes the sum of forty thousand and twenty-one dollars and eighty-four cents (including
60 interest to this 26th day of April, 1869) over and above all discounts, to the best of his knowledge and belief.

GEO. McCAFFRAY, *J. P.*

A copy of which said declaration was made and sent with the said writ to the sheriff of the city aforesaid thereon endorsed: So served on the defendant with the writ.

At which mentioned second Monday of May, in the year aforesaid, being the day of the return of the foregoing writ, comes into court here the said plaintiff, by his attorneys aforesaid, and the sheriff of Baltimore city aforesaid, to wit, John W. Davis, gentleman, to whom the foregoing writ was in form aforesaid directed, makes return thereof to the court here thus endorsed, to wit:

"Summoned by service on William H. Perot, president. Copy left.

"JOHN W. DAVIS, *Sheriff.*"

And the said defendant, being called, appears in court here, by John Stewart and J. Blair Hoge, Esqrs., its attorneys.

And thereupon, in pursuance of the statute in such case made and provided, further day is given to the said defendant at any time before the second Monday in June next to file a plea, etc., or judgment by default will be rendered against it.

The same day is given to the said plaintiff then and there, &c.

At which said second Monday of June, in the year aforesaid, came into court here the said plaintiff, by his attorneys aforesaid.

And the said defendant comes not, but makes default.

Therefore it is considered by the court here that the said plaintiff recover against the said defendant.

But, because it is unknown to the court here what damages the said plaintiff hath sustained, a day is given to the said parties before the court here, on the second Monday in September next, to inquire of and assess the damages which the said plaintiff hath sustained by reason of the premises.

At which said second Monday of September, in the year aforesaid, comes into court here the said plaintiff, by his attorneys aforesaid, but the said defendant comes not.

And, because it is still unknown to the court here what damages the said plaintiff hath sustained, a further day is given to the said parties before the court here, on the second Monday of January next, to inquire of and assess the damages which the said plaintiff hath sustained by reason of the premises.

61 At which said second Monday of January, in the year of our Lord eighteen hundred and seventy, comes again into

court here the said plaintiff, by his attorneys aforesaid, but the defendant comes not.

And, because it is still unknown to the court here what damages the said plaintiff hath sustained, a further day is given to the said parties before the court here, on the second Monday in May next, to inquire of and assess the damages which the said plaintiff hath sustained by reason of the premises.

And now, at this day, to wit, the said second Monday of May, in the year last aforesaid, comes again into court here the said plaintiff, by his attorneys aforesaid, but the defendant comes not.

Thereupon the said plaintiff, by his attorneys aforesaid, prays that the court assess his damages.

Whereupon the court here assess the damages of the said plaintiff on account of the premises and file in said cause the following order, to wit:

Order of Court. Filed 24th June, 1870.

In the Superior Court of Baltimore City.

W. W. GLENN
vs.
NATIONAL EXPRESS AND TRANSPORTATION CO.

Judgment by default. June 8, 1869.

Upon legal and satisfactory proof of the correctness and amount of the claim for which the above suit was brought being produced to the court, it is ordered, this twenty-fourth day of June, 1870, that the judgment by default in this cause be extended for 42,531 dollars 31 cents, damages assessed by the court.

GEORGE W. DOBBIN.

Therefore it is considered by the court here that the said plaintiff recover against the said defendant as well the sum of forty-two thousand five hundred and thirty-one dollars and thirty-one cents, with interest from the twenty-fourth day of June, eighteen hundred and seventy, as the sum of eight dollars and sixty-five cents, for his cost and charges by him about his suit in this behalf laid out and expended; and the said defendant in mercy, &c.; and the said plaintiff have thereof his execution, &c.

62 *Memorandum.*

Final judgment was rendered in this case on the 24th June, 1870, for the plaintiff for $42,531.31, the damages assessed by the court, with interest from the 24th day of June, 1870, and costs.

Costs, $8.65.

STATE OF MARYLAND, }
City of Baltimore, } *sct:*

I, Francis A. Prevost, clerk of the superior court of Baltimore

city, do hereby certify that the aforegoing is a full, true, and entire transcript taken from the record and proceedings of the said court in the therein-entitled cause.

In witness whereof I hereunto set my hand and affix the seal of the superior court of Baltimore city aforesaid on this first day of July, eighteen hundred and seventy-nine.

[SEAL.] F. A. PREVOST, *Clerk.*

MARYLAND, *sct:*

I, George W. Dobbin, associate judge of the supreme bench of Baltimore city, assigned to and presiding in the superior court of Baltimore city and the eighth judicial circuit of said State, do certify that the foregoing attestation of Francis A. Prevost, clerk of the said superior court of Baltimore city, is in due form and by the proper officer.

Given under my hand, at the city of Baltimore, this first day of July, in the year one thousand eight hundred and seventy-nine.

GEORGE W. DOBBIN.

STATE OF MARYLAND, *City of Baltimore,* } *sct:*

I, Francis A. Prevost, clerk of the superior court of Baltimore city, do hereby certify that the Honorable George W. Dobbin, who has certified and signed the above attestation, was, at the time of so doing, presiding judge of the superior court of Baltimore city, in the eighth judicial circuit of the State of Maryland, duly commissioned and qualified, and that to all acts done by him in that capacity full faith and credit are due and ought to be given, and that his signature thereto is genuine.

In testimony whereof I hereunto subscribe my name and
63 affix the seal of the superior court of Baltimore city on this first day of July, A. D. eighteen hundred and seventy-nine.

[SEAL.] FRANCIS A. PREVOST,
Clerk of the Superior Court of Baltimore City.

And thereupon subpœnas in chancery were issued against the defendants, directed to the sheriffs of the cities of Richmond and Lynchburg, returnable to 1st September rules; which subpœnas and the returns of the sheriffs thereon are in the words and figures following, to wit:

Subpœnas.

The Commonwealth of Virginia to the sheriff of the city of Richmond, Greeting:

We command you that you summon the National Express and Transportation Company, W. H. Perot, William Devries, D. J. Foley, Joseph R. Anderson, F. P. Zimmerman, J. Carter Mowbray, William H. Webb, Lorenzo Norvell, and M. B. Poiteaux and John Blair Hoge and John J. Kelly, trustees, to appear at the clerk's office of the court of chancery of the city of Richmond, at the rules to be held for the

said court on the first Monday in September, 1879, to answer an original, amended, and supplemental bill in chancery exhibited against them in our said court by John W. Wright, sheriff of the city of Richmond, and as such administrator of W. W. Glenn, deceased, who sues on behalf of himself and such other creditors of the National Express and Transportation Company.

And have then there this writ.

Witness Benjamin H. Berry, clerk of our said court, at the courthouse, the 5th day of August, 1879, and in the 103d year of our foundation.

BENJ. H. BERRY.

Returns.

Executed Aug. 8, 1879, by delivering to Joseph R. Anderson and M. B. Poiteaux each a copy of the within.

L. P. WINSTON, *D. S.*,
For JNO. W. WRIGHT, *S. C. R.*

64 Executed in the city of Richmond Aug. 8, 1879, as to the National Express and Transportation Company by delivering to Jos. R. Anderson, a director, and M. B. Poiteaux, cashier, of the said company, each a copy of the within spa. in chancery, each of whom is a resident of said city of Richmond, the president not being a resident of the city of Richmond. The other defendants are no inhabitants.

L. P. WINSTON, *D. S.*,
For JNO. W. WRIGHT, *S. C. R.*

The Commonwealth of Virginia to the sheriff of the city of Lynchburg, Greeting:

We command you that you summon Lorenzo Norvell to appear at the clerk's office of the court of chancery of the city of Richmond, at the rules to be held for the said court on the first Monday in September, 1879, to answer original and amended and supplemental bill in chancery exhibited against him and others in our said court by John W. Wright, sheriff of the city of Richmond, and as such administrator of W. W. Glenn, deceased, who sues on behalf of himself and such other creditors of the National Express and Transportation Company; and have then there this writ.

Witness Benjamin H. Berry, clerk of our said court, at the courthouse, the 5th day of August, 1879, and in the 103d year of our foundation.

BENJ. H. BERRY.

Return.

Executed August 6th, 1879, on Lorenzo Norvell by delivering to him a true copy of the within summons.

M. J. DAY, *D. S.*,
For JNO. W. WRIGHT, *S. C. R.*

And affidavit having been made and filed that the defendants, Wm. H. Perot, William Devries, D. J. Foley, F. P. Zimmerman, J. Carter Mowbray, William H. Webb, John Blair Hoge, and John J. Kelly, are non-residents of the State of Virginia, it is ordered that they appear here within one month after due publication hereof and do what is necessary to protect their interests herein.

And at another day, to wit, at rules held in the clerk's office of the said court on the first Monday in September, 1879, came the defendant, M. B. Poitiaux, by counsel, and filed his answer to
65 the plaintiff's bill, to which answer the plaintiff replied generally, and the same is in the words and figures following, to wit:

Answer of M. B. Poitiaux.

The answer of M. B. Poitiaux, one of the defendants in a suit now before your honor, John W. Wright, sheriff of the city of Richmond, and as such administrator of W. W. Glenn, deceased, who sues, &c., &c., against the National Express and Transportation Company, W. H. Perot, M. B. Poitiaux, and other defendants.

To the Hon. E. H. Fitzhugh, judge of the chancery court of the city of Richmond:

For answer your respondent would say that he was the cashier of the first division of the said National Express and Transportation Company, his office being in the city of Richmond, at the time of the conveyance executed by the said National Express Company to John J. Kelly, John Blair Hoge, and Columbus O. O'Donnell, trustees; that he had been cashier as aforesaid for some four or five months previously; that the said first division comprised the States of Virginia, North Carolina, part of South Carolina, and Bristol, Tennessee; that the said National Express and Transportation Company is in debt to your respondent, as of the 31st day of January, 1867, in the sum of three hundred dollars for arrearages of his salary due and unpaid, and in the further sum of twenty-seven dollars and twenty-five cents for monies advanced by him to pay sundry petty expenses in the office of the company, and which have never been refunded to him; that he has no books and papers in his possession belonging to the said express and transportation company; that he does not know anything about the transactions of the said trustees, nor in whose possession the books and papers now are or what has become of them; that he is not now nor ever was a stockholder in the said National Express and Transportation Company; and, having fully answered, prays to be hence dismissed, &c.

M. B. POITIAUX.

STATE OF VIRGINIA,
City of Richmond, } *To wit:*

This day personally appeared before me, J. L. Williams, a notary public in and for the city aforesaid, M. B. Poitiaux, and made oath

in due form of law that the statements made in the foregoing answer are true.

Given under my hand this 30th day of August, 1879.

J. L. WILLIAMS,
Notary Public.

66 And the subpœnas having been returned executed on Joseph R. Anderson, M. B. Poitiaux, The National Express and Transportation Company, and Lorenzo Norvell, and these defendants, except M. B. Poitiaux, failing to appear, it was ordered that unless they should appear at the then next rules and plead, answer, or demur to the plaintiff's bills the same would be taken for confessed as to them and the matters thereof decreed accordingly; and the cause was continued for proof of the publication and posting of the order heretofore made in this cause as to the non-resident defendants.

And at another day, to wit, at rules held in the clerk's office of the said court on the last Monday in September, 1879.

The defendants, Joseph R. Anderson, The National Express and Transportation Company, and Lorenzo Norvell, still failing to appear, plead, answer, or demur to the plaintiff's original and amended and supplemental bills, the same were taken for confessed, and, on motion of the plaintiff, by counsel, the cause was set for hearing as to them and M. B. Poitiaux; and the cause was continued for proof of publication and posting of the order heretofore made as to the non-resident defendants.

And at another day, to wit, in the clerk's office of the said court, on the 6th day of October, 1879.

Proof of the publication and posting of the order made herein on the 4th day of August, 1879, and also of the subpœna in chancery issued herein on the 5th day of August, 1879, having been filed, on motion of the plaintiff's counsel, the cause was set for hearing as to all the defendants.

The Commonwealth of Virginia to the sheriff of the city of Richmond, Greeting:

We command you that you summon the National Express and Transportation Company, Wm. H. Perot, William Devries, D. J. Foley, Joseph R. Anderson, F. P. Zimmerman, J. Carter Mowbray, William H. Webb, Lorenzo Norvell, and M. B. Portiaux, John Blair Hoge, and John J. Kelly, trustees, to appear at the clerk's office of the court of chancery of the city of Richmond, at the rules to be held for the said court, on the first Monday in September, 1879, to answer original, amended, and supplemental bill in chancery, exhibited against them in our said court by John W. Wright, sheriff of the city of Richmond, and as such administrator of W. W. Glenn, deceased, who sues on behalf of himself and such other creditors of the National Express and Transportation Company,
67 and have then there this writ.

Witness Benjamin H. Berry, clerk of our said court, at the

court-house, the 5th day of August, 1879, and in the 103d year of our foundation.

BENJ. H. BERRY.

A copy.
Teste: BENJ. H. BERRY, *Clerk.*

In the clerk's office of the chancery court of the city of Richmond, the 29th day of September, 1879, John A. Meanley this day made oath before me that he did, on the first day of September, 1879, that being the first day of the September term of the hustings court of said city, post a copy of the annexed order of publication at the front door of the new city hall, in which said hustings court holds its sessions.

J. T. POINDEXTER, *Dep. Clerk.*

I hereby certify that the summons hereto attached of Berry, clerk of court, in suit of Wright *vs.* National Transportation Co. and others, was published in "The State" newspaper once a week for four weeks, the first insertion being on the 5th day of August, 1879.

JNO. HAMPDEN CHAMBERLAYNE,
Ed'r, &c.
CHAMBERLAYNE & BEIRNE,
Ed'rs and Prop'rs.

VIRGINIA:

In the Clerk's Office of the Chancery Court of the City of Richmond, August 5, 1879, in Vacation. In Chancery.

JOHN W. WRIGHT, Sheriff of the City of Richmond, and as Such Administrator of W. W. Glenn, Deceased, who Sues on Behalf of Himself and Other Creditors of the National Express and Transportation Company, Plaintiff,

against

THE NATIONAL EXPRESS AND TRANSPORTATION COMPANY, W. H. Perot, William Devries, D. J. Foley, Joseph R. Anderson, F. P. Zimmerman, J. Carter Mowbray, William H. Webb, Lorenzo Norvell, M. B. Portiaux, John Blair Hoge, and John J. Kelly, Trustees, Defendants.

On original, amended, and supplemental bill.

The object of this suit is to obtain a construction and enforcement of the deed of trust, in the proceedings mentioned, from the National Express and Transportation Company to the defendants, John Blair Hoge and John J. Kelly and another, to remove said Hoge and Kelly as trustees in said deed, and to subject all of the property,
68 estate, and rights of every kind of said company to the payment of the debts of the plaintiff and other creditors of said company, and in furtherance thereof to appoint a receiver or receivers, with due powers to collect and make available

such property, estate, and rights; and affidavit having been made and filed that the defendants, Wm. H. Perot, William Devries, D. J. Foley, F. P. Zimmerman, J. Carter Mowbray, William H. Webb, John Blair Hoge, and John J. Kelly, are non-residents of the State of Virginia, it is ordered that they appear here within one month after due publication hereof and do what is necessary to protect their interests herein.

A copy.
Teste:

BENJ. H. BERRY, *Clerk.*
JOHN HOWARD, *P. Q.*

I hereby certify that the notice hereto attached of Benj. H. Berry, clerk, John Howard, P. Q., in suit of Wright, adm'r, *vs.* The National Express and Transportation Co. and others, was published in "The State" newspaper once a week for four weeks, the first insertion being on the 6th day of August, 1879.

RICHARD F. BEIRNE, *Editor, &c.,*
For CHAMBERLAYNE & BEIRNE,
Owners and Editors of "The State."

In the clerk's office of the chancery court of the city of Richmond, the 29th day of September, 1879, John A. Meanley this day made oath before me that he did on the 1st day of September, 1879, that being the first day of the September term of the hustings court of said city, post a copy of the annexed order of publication at the front door of the new city hall, in which said hustings court holds its session.

J. T. POINDEXTER, *Dep. Clerk.*

And at the same day, to wit, at a chancery court of the city of Richmond, continued by adjournment and held for said city on the 6th day of October, 1879.

JOHN W. WRIGHT, Sheriff of the City of Richmond, and as Such Administrator of W. W. Glenn, Deceased, who Sues on Behalf of Himself and Other Creditors of the National Express and Transportation Co., Plaintiff,

against

THE NATIONAL EXPRESS AND TRANSPORTATION CO., W. H. PEROT, Wm. Devries, D. J. Foley, Jos. R. Anderson, F. P. Zimmerman, J. Carter Mowbray, W. H. Webb, Lorenzo Norvell, M. B. Poitiaux, John Blair Hoge, and John J. Kelly, Trustees, Defendants.

69 This day this cause came on to be heard upon the original and amended bills taken for confessed as to all of the defendants, except M. B. Poitiaux and Joseph R. Anderson, upon the several answers of the said Poitiaux and Anderson (that of the said Anderson being this day filed by leave of court), with replications thereto and exhibits filed, and was argued by counsel.

On consideration whereof it is adjudged, ordered, and decreed that one of the commissioners of this court do inquire and report—

1. An account of the debts due by the said defendant, The National Express and Transportation Company, and the priorities thereof, if any.

2. An account of the assets of said defendant company.

And such commissioner is directed to report specially any matters deemed pertinent by him or which he may be required to state by any of the parties.

Any party to the cause may be examined before such commissioner, and all or any books, papers, and documents of the said defendant company in the possession of any party may be called for and required to be produced.

And it is further ordered that notice of the time and place of taking the said accounts be published once a week for four successive weeks in The State newspaper, published in the city of Richmond, and that such publication shall be equivalent to personal service of such notice on the parties to this cause.

The answer of Joseph R. Anderson, referred to in foregoing decree, is in the words and figures following, to wit:

Answer of Jos. R. Anderson.

To the Hon. Edward H. Fitzhugh, judge of the chancery court of the city of Richmond:

The separate answer of Joseph R. Anderson, one of the defendants to an original, amended, and supplemental bill of complaint exhibited against him and others in the chancery court of the city of Richmond by John W. Wright, sheriff of the said city, and as such administrator in Virginia of W. W. Glenn, dec'd, complainant.

This respondent, reserving to himself the benefit of all just exceptions to the said original, amended, and supplemental bill, for answer thereto, or to so much thereof as he is advised that it is material he should answer, answers and says that he does not admit that he is a director in the National Express and Transportation Company, but that to the best of his knowledge and belief he resigned the directorship of the company very soon after his elec-
70–74 tion thereto; that, moreover, he does not remember ever having acted in the capacity of director of the said company at a single one of its meetings; and he prays to be hence dismissed with his reasonable costs by him in this behalf expended; and he will ever pray, &c.

JOSEPH R. ANDERSON,
Defendant.
JAMES ALFRED JONES,
J. F. T. ANDERSON, *P. D.*

VIRGINIA,
City of Richmond, } *To wit:*

This day personally appeared before me, Tazewell Ellett, a notary

public for the city and State aforesaid, Joseph R. Anderson, whose answer is above written, and made oath that the statements contained in the said answer are true.

Given under my hand this 6th day of October, in the year 1879.

TAZEWELL ELLETT, *N. P.*

* * * * * * *

[At this point are omitted three petitions in the cause in behalf of (1) the Baltimore & Ohio Railroad Company, (2) the Bank of Commerce of Baltimore, and (3) the Philadelphia, Wilmington & Baltimore Railroad Company, praying to be made parties plaintiff in the cause, together with orders of the court granting such prayers.]

75 And at another day, to wit, on the 19th day of June, 1880, a report of Commissioner Otho G. Kean was filed in the cause, and the same and the depositions and exhibits filed therewith are in the words and figures following, to wit:

Report of Com'r Kean.

In Richmond Chancery Court.

GLENN, Adm'r,
v.
THE NATIONAL EXPRESS & TRANSPORTATION COMPANY.

COMM'R'S OFFICE, 1113 MAIN STREET,
RICHMOND, *June* 19, 1880.

To the Hon. Ed. H. Fitzhugh, judge of said court:

By decree of this court, entered in the above-styled cause October 6, 1879, it was "adjudged, ordered, and decreed that one of the commissioners of this court do inquire and report—

"1. An account of the debts due by the said defendant, The National Express and Transportation Company, and the priorities thereof, if any.

"2. An account of the assets of said defendant company.

"And such commissioner is directed to report specially any matters deemed pertinent by him or which he may be required to state by any of the parties." And said decree also provided that such inquiry and report should only be made after the commissioner to whom the cause might go had notified all parties in interest, by publication once a week for four successive weeks in some newspaper published in Richmond, of the time and place fixed on

76 by him for execution of said decree of October 6, 1879. Counsel for complainant having requested me to act in the cause, I inserted a notice in The State, a newspaper published in Richmond, informing all persons interested in the National Express and Transportation Company, whether as creditors or otherwise, that I had fixed on Saturday, November 8, 1879, at ten o'clock a. m., as the time and my office, in Richmond, as the place for executing the said

decree of October 6th, 1879. A copy of this notice, evidenced as the law requires, is hereto annexed.

On the appointed day John Howard, Esq., counsel for complainant, appeared before me, and at his instance the taking of depositions was commenced and continued, with regular adjournments, from time to time until concluded, on May 7, 1880. During this period I took the depositions of quite a number of witnesses, many of whom were formerly officers and employees of the company, received and filed a vast number of exhibits, and also had before me many of the books of the defendant company. These depositions and exhibits are herewith returned; the books are not filed with my report because their custodian, Mr. John J. Kelly, of New York, did not feel authorized to part with them. In his testimony, however, and from inspection and examination of the books themselves, I have secured, I think, all that they contain pertinent to this matter. These depositions, books, and exhibits—the latter comprising open accounts, notes, bills of exchange, and judgments, evidencing debts due by the defendant company—these papers and documents, I say, constituting all the evidence produced before me, I now beg to present the following report in response to the decree of October 6, 1879:

1st. That the account herewith returned, marked No. 1, contains an accurate statement of the debts and demands alleged and proved before me against the defendant, The National Express & Transportation Company; that the aggregate indebtedness, as shown by said account, is $509,392.41, distributed under two classes—the first of which foots up $104,911.40; the second, $404,481.01—and that while creditors standing in the same class are to be paid ratably *inter esse*, those standing in the first class are to be paid in full before those in the second receive anything. This discrimination is made by the defendant company itself, as will be seen on reference to the deed by which it conveyed all its assets in trust for benefit of creditors. By the provisions of that deed the Bank of Commerce of Baltimore and the Baltimore & Ohio R. R. Co. are constituted preferred creditors.

2nd. That the assets of the defendant company consist exclusively of what may be raised by assessments on its stockholders.

3rd. And, by way of special matter, that the annexed account or statement, marked No. 2, shows in condensed* form the
77–109 number of shares of stock held in the National Express and Transportation Company, where they are held, the par value of such stock, the par value of the same less 20 per cent. heretofore assessed, and which has either been paid in or irrevocably lost, and finally an estimate of the assessment which will be necessary to pay the debts asserted in this suit, together with the expenses of collecting such assessment.

Respectfully submitted,

OTHO G. KEAN, *Comm'r.*

Com'r's fee, $100.

*Taken from stock book of Co.

NOTE.—I was requested by counsel to give an estimate of the probable expenses of collecting the assessment on the stock of the def't Co., but on reflection think it better that the amount should be fixed by the court, when the assessment made on account of creditors can easily be enlarged so as to include that on account of costs, &c.

O. G. K., *Comm'r.*

* * * * * * *

[At this point is omitted Statement No. 1, referred to in the commissioner's report, being a detail of various claims which make up the aggregate of $509,392.41 reported as due by the company to numerous individuals.]

110 *Statement No. 2,*

Showing No. shares stock held in Nat'l Ex. & Trans'n Co., par value per share, aggregate par val. of s'd stock, where same is held, &c.

Where held.	Par value.	No. of shares.
New York	$100 00	12,032
Baltimore	"	4,044
Washington, D. C.	"	1,815
Georgetown, D. C.	"	945
111–186 Richmond	"	2,349
Staunton	"	1,494
Charlottesville	"	1,585
Lynchburg	"	2,329
Norfolk	"	230
Fredericksburg	"	527
Virginia (miscellaneous)	"	276
Charlotte, N. C.	"	287
North Carolina (miscellaneous)	"	365
Augusta, Georgia	"	2,618
Atlanta, "	"	1,210
Macon, "	"	1,430
Savannah, "	"	290
Rome, "	"	216
Montgomery, Ala.	"	520
Mobile, Ala.	"	142
New Orleans, La.	"	1,863
St. Louis, Mo.	"	3,270
Miscellaneous places	"	207
Total No. shares	"	40,044

Then 40,044 shares would make the par value of all the company's stock	$4,004,400 00
From which deduct 20 per cent. already paid in or lost	800,880 00
Leaving par val. of unpaid stock to which creditors look	3,203,520 00

The aggregate of debts, as shown by acc't No. 1, is $509,392.41, which will require an assessment of about 20 per cent. on $3,203,520, the value of unpaid stock as above reported, after making an extremely moderate allowance for insolvent stockholders. Indeed, I feel very sure that the sequel will show it to be insufficient.

O. G. KEAN, *Comm'r.*

* * * * * * *

[At this point is omitted a detail of the depositions taken by the commissioner in support of the above report by him as to the indebtedness of the company and as to the other matters embraced in his report.]

187 And at another day, to wit, at a chancery court of the city of Richmond, continued by adjournment and held for said city on the 14th day of December, 1880.

188 JOHN W. WRIGHT, Sheriff of the City of Richmond, and as Such Administrator of W. W. Glenn, Deceased, Who Sues, &c., Pl't'ff,
against
THE NATIONAL EXPRESS AND TRANSPORTATION COMPANY and Others, Def'ts. } In Chancery.

This cause, in which proceedings have been had in the mode prescribed by the statute against the absent defendants, Wm. H. Perot, Wm. Devries, D. J. Foley, F. P. Zimmerman, J. Carter Mowbray, and Wm. H. Webb, and which has been regularly matured and proceeded in as to all of the defendants, came on this day to be heard upon the cause set for hearing as to the said absent defendants (M. G. Harman, one of the board of directors of said company, being dead, the suit is abated as to him) and upon the papers formerly read, the answer of the defendant, John Blair Hoge, and the original answer of John J. Kelly, both of which were tendered, to be filed at the last term, and are this day filed *nunc pro tunc*, and the amended and supplemental answer of the said defendant, John J. Kelly, this day filed, the general replications of the plaintiffs to the said revival answers, and upon the report of Master Commissioner O. G. Kean, of the 19th day of June, 1880, and the amended and supplemental report of said commissioner this day filed, to which said several reports there is no exception, and upon exhibits filed, and was argued by counsel. On consideration whereof and for reasons expressed in writing, filed and hereby made a part of the

record and to be so considered, but not to be entered upon the order book, the court is of opinion (1st) that the deed of trust in the proceedings mentioned, bearing date the 20th day of September, 1866, made by the said National Express and Transportation Company to John Blair Hoge, John J. Kelly, and C. Oliver O'Donnell, trustees, for the benefit of sundry creditors therein referred to, is a good and valid deed under the laws of the State of Virginia, where the said corporation was chartered and had its principal office and where the said deed was executed, delivered, and recorded, and the court doth so adjudge, order, and decree; and the court is further of opinion (2ndly) that, under the laws of the State of Virginia, the legal effect of the said deed was to grant, convey, and assign to the said trustees all of the estate, property, rights, and credits of the said company of every kind and wherever situated or being, and that accordingly all of the said estate, property, rights, and credits did pass to and were vested in the said trustees by the said deed, including the credits allowed by statute and by the said company to its stockholders for the uncalled-for and unpaid part of their
189 several subscriptions to the capital stock of the said company, and the right to receive and collect the same according to the terms of said contract of subscriptions for the purposes of said trust, and the court doth so adjudge, order, and decree.

(3.) And the court, being of opinion that the preferences provided for by said deed in favor of certain creditors therein referred to are legal and valid according to the laws of Virginia, doth so adjudge, order, and decree.

(4.) And it appearing to the court that said John Blair Hoge and John J. Kelly, surviving trustees in said deed, are willing each to resign and renounce the office of trustee under said deed, and that they are so situated as not to be able efficiently to perform the duties of the same, and that it is right and expedient, under all the circumstances, that they be relieved from the said trusteeship, the court doth adjudge, order, and decree that the said John Blair Hoge and John J. Kelly, surviving trustees of themselves and C. Oliver O'Donnell under the said deed, bearing date the 20th day of September, 1866, executed to them by the said National Express and Transportation Company in trust for the benefit of its creditors, be, and they are hereby, respectively removed from the office of trustee under said deed.

(5.) And it further appearing to the court that John Glenn, Esquire, of number twelve St. Paul street, in the city of Baltimore and State of Maryland, is a fit and proper person to execute the duties of said trust, it is adjudged, ordered, and decreed that the said John Glenn be, and he is hereby, substituted and appointed trustee in the said deed in the room and stead of the said Hoge and Kelly, hereby relieved and removed, and that he be, and is hereby, clothed with all the rights and powers and charged with all the duties of executing the trusts of said deed to the same effect as were the original trustees therein; and the said John Blair Hoge and John J. Kelly are authorized and directed to transfer and deliver to the said John Glenn, substituted trustee as aforesaid, all of the books and papers

of the said National Express and Transportation Company of every kind and description, and all of the estate and property of said company of every kind and description now in possession of them, the said Hoge and Kelly, or either of them, and the receipt of the said John Glenn to them for the same shall be full acquittance and discharge therefor.

But the said John Glenn is not to take possession of said property, books, and papers or receive any money as such substituted trustee until he or some one for him shall enter into *into* bond, with good security, before the clerk of this court, in the penalty of one hundred thousand dollars, conditioned for the faithful discharge of his duties as such trustee.

(6.) And the court doth approve and confirm so much of said report of Commissioner O. G. Kean, filed on the 19th day
190–204 of June, 1880, as ascertains the debts of said company, and doth adjudge, order, and decree that the said National Express and Transportation Company do pay * * *

[At this point is omitted the details of the names of numerous creditors of the company with the amount decreed to be paid to each, being in all $509,392.41, as above reported by the commissioner.]

205 And the court, without at this time specifying or determining the order of priority in which said debts due by the said National Express and Transportation Company shall be paid out of any property and assets conveyed by the said deed of trust of the 20th day of September, 1866, but expressly reserving all such matters for future consideration, doth adjudge, order, and decree that the several classes of debts secured in and by said deed be paid in the order of priority in which it shall hereafter appear upon inquiry they are preferred, if such inquiry shall become necessary and proper.

And it appearing to the court that the calls for subscriptions heretofore made by the said company, amounting to twenty per cent., have been exhausted or are now unavailing, and that the said company has now no property or assets out of which said debts or any part of them can be made, except the uncalled-for and unpaid subscriptions to the capital stock, amounting to eighty per cent., the right to receive and collect which, according to the contracts of subscription, as well as the former calls, was conveyed and assigned in trust as aforesaid, and constitute a trust fund in the hands of
206 the subscribers, which is primarily liable for the debts of the company; and it further appearing *that* the court that by the second and fourth clauses of said deed of trust the trustees therein named were clothed with ample authority and power to collect, by suit or otherwise, all of the debts, claims, and moneys payable to said company which were assigned by said deed; and it further appearing to the court that on account of death, removal, insolvency, and other causes much of said uncalled-for and unpaid subscriptions has been lost and great difficulty has been encountered in realizing what remains good from stockholders scattered in and

among so many different and distant localities and States, and that it is necessary and proper that at least thirty per cent. of said subscriptions be now called for and required in order to meet the debts of said company and the costs and expenses of collecting and administering said fund; and it further appearing to the court that the said company has long since ceased and abandoned its business, and that for about fourteen years there has been no meeting either of the stockholders or of its board of directors, it is adjudged, ordered, and decreed that a call and assessment be, and the same are hereby, made upon the capital stock and stockholders of the said National Express and Transportation Company of thirty per centum of the par value of said stock, being thirty dollars on each and every share thereof, and that the stockholders of said company and each and every of them and their legal representatives and assigns be, and they are hereby, severally required to pay the several amounts hereby called for and assessed to the said John Glenn, of the city of Baltimore, in the State of Maryland, substituted trustee in said deed of trust from the said company of the 20th day of September, 1866, and the said trustee is hereby authorized and directed to collect and receive the said call and assessment and to take such prompt steps to that end by suit or otherwise and in such jurisdictions as he may be advised, and if the amount realized from this call and assessment shall prove to be insufficient for the purposes of this decree liberty is reserved to the said creditors and the said trustee to move the court for such further assessment as may be necessary and proper.

And after paying the necessary and proper costs and expenses of executing this decree the said trustee is directed to deposit his collections in the Planters' National Bank of Richmond to the credit of the court in this cause or in such other bank as may from time to time be designated by the court, and to file the certificates of such deposits with the clerk of this court, and said trustee will make report to the court from time to time of his proceedings under this decree, and will settle his accounts from time to time before one of
the master commissioners of this court, not permitting any
207 six months to intervene between such settlements, and such commissioner is directed and required to make report to the court of such settlements as soon as made.

And upon the coming in of such report, as soon as sufficient sums shall be collected, the court will take order as to the proper distribution of the fund among those entitled thereto.

The answer of John Blair Hoge and John J. Kelly, referred to in foregoing decree of Dec'r 14th, 1880, is in the words and figures following, to wit:

Answer.

In the Chancery Court of the City of Richmond, Va.

JOHN W. WRIGHT, Sheriff, &c., and as Such Administrator of W. W. Glenn, Who Sues, &c.,

against

JOHN BLAIR HOGE and JOHN J. KELLY, Impleaded with THE NATIONAL EXPRESS AND TRANSPORTATION COMPANY and Others.

The separate and several answer of John Blair Hoge and John J. Kelly, as surviving trustees, named with others as defendants in the bill of complaint originally filed by Wm. W. Glenn, as complainant, now deceased, respectfully shows to the court as follows:

These defendants, now and at all times hereafter saving and reserving to themselves all manner of benefit and advantage of exception to the many errors and insufficiencies in the complainant's said bill of complaint contained, for answer thereunto or to so much or such parts thereof as said defendants are advised is material for them to make answer unto, answer and say that these said defendants deny each and every allegation in the complaint made, except such as hereinafter specially admitted.

The said defendants admit that the complainant, William W. Glenn, was, and that his legal representative now is, one of the creditors of said The National Express and Transportation Company in the bill of complaint mentioned.

And said defendants admit that said National Express and Transportation Company was duly incorporated by the Legislature of the State of Virginia on the — day of ——, 1865, as in that behalf is alleged in the bill of complaint.

And said defendants admit further that said company accepted said act of incorporation and proceeded to conduct its business in pursuance thereof until the 20th day of September, 1866, when said company, having become much embarrassed in its affairs and owing large debts to various persons, made and executed a deed of trust, for the benefit of its creditors, to these defendants, John Blair Hoge and John J. Kelly (and to one C. Oliver O'Donnell, who is
208 named as a defendant, but who, as these defendants are informed and believe, is now dead), dated the 20th day of September, 1866, which thereafter to said trustees was duly delivered and which was duly recorded in the city of Richmond, in the city of Baltimore, and elsewhere, as is in the bill of complaint in that behalf alleged.

And said defendants admit further that the assets of said company, to which its creditors have to look mainly for the payments of their debts, consist now only of the amounts contracted to be paid by the subscribers to its capital stock, as in the bill of complaint in that behalf is alleged.

And said defendants admit that the total number of shares of the

stock of said company which had been subscribed for at the date of said assignment was about $40,044, each share being of the par value of $100, and said subscriptions representing the aggregate of about $4,004,400; and that on the 29th day of October, 1866, the condition of said company with reference to its stock and debts was, and was reported at a meeting of stockholders, as in the bill of complaint in that behalf is alleged.

And said defendants admit that the subscribers to the capital stock of said company resided, and now reside, in many States, and not within the jurisdiction of any one court.

And that by the terms of the subscription the subscribers were bound to pay the amount of said subscription as and when the same should be called for by said company.

And that the total amounts of assessments or calls made by said company upon its stockholders was twenty per cent. of the amount of the subscriptions, and that the amounts paid in money or by notes upon said calls of twenty per cent. are correctly set forth in the bill of complaint.

And that a very small part of the said assessments to the amount of twenty per cent. which remained unpaid at the date of said report has been since paid or collected from the delinquent stockholders.

And that no subsequent call or assessment was made upon its stockholders by said company, and that eighty per cent. of the amount of said subscriptions remain uncalled for and unpaid.

And that said trustees were not requested to take possession of said trust estate under said deed until on or about the 3rd day of November, 1866; and that, in the meantime, nearly all of the visible property of said company had been levied upon and taken under legal process by its creditors; and that the amount of the same was wholly insufficient to pay the debts of said company.

And that said company had hypothecated or otherwise used and parted with a considerable amount of the notes and other obligations received by it from stockholders on account of amounts due by them on said calls, and that the actual amount of money realized and received by said trustees under said assignment was not
209 sufficient to pay the debts due the preferred creditors of the first class mentioned in said deed of trust.

And that of the amount of the said assessments upon the subscribers of twenty per cent. a large part cannot be collected at all by reason of the insolvency of the subscribers, and that a large part of said assessments has been lost by lapse of time and cannot now be collected.

And that as to the debts due upon said unpaid assessments said trustees have been hindered and delayed in the collection of the same by adverse litigation in the State of Maryland and in the State of New York and in other States, and that the right of said trustees to receive and collect the debts due the company by subscribers on said assessments has been called in question in some of the suits and validity of said deed of trust has been disputed.

And that in some of said suits said trustees have been enjoined from proceeding to collect the debts due said company, and said

trustees have thus far been able to collect very little of said debts by reason of the difficulties interposed by said litigation.

And that the debts due said company and which ought to be applied in payment of its creditors are either now lost in a great part or are in danger of being lost and are not now available for the payment of said creditors.

And that, even if said trustees can surmount the embarrassments and difficulties which have prevented them hitherto from realizing said assets, the amount which can be realized from all the property which passed to such trustees, and which could, under any circumstances, be realized by them, would be entirely inadequate to pay the just debts of said company—

For that, as said defendants are advised by the true construction of said deed of trust, no part of the eighty per cent. of subscriptions to said capital stock, which had not been called for by said company from its subscribers, passed to said trustees, nor any power to sue for or to collect said subscriptions so uncalled for; but that the relations between said company and its subscribers and their legal rights and obligations as to said uncalled-for part of said subscription remained unaffected by said deed of trust.

And said defendants are advised that under said deed of trust said trustees acquired no right to sue a subscriber for his subscription to said stock, except to the extent that said company could sue such subscriber; and said defendants are advised that said company could not sue one of its subscribers for his subscription unless and until said company has first made an assessment or call upon such subscriber therefor; and said defendants are advised that, allowing said deed to have full legal validity elsewhere and allowing said trustees to proceed without impediment to collect all the debts
210 due the company collectible by them, the provisions of said deed of trust are wholly inadequate to provide for the payment of the debts of said company, many of whose creditors are in very needy circumstances and nearly all of whom have waited nearly fourteen years for the satisfaction of their just demands.

And said defendants are advised that if said company were now to levy an additional assessment upon its stockholders it is doubtful whether the right to sue for and collect such assessment would vest in said trustees under said deed; and in attempting to collect the same said trustees would meet with this additional embarrassment, besides those which have attended their efforts to collect the calls already made and unpaid at the date of said deed, and which were intended to be conveyed to them by said deed.

And said defendants are advised that if it be held that any new call to be made by said company would not pass to said trustees, and they would not for any reason be entitled to collect the amount thereof, but that the amount of such calls would be due to the said company by the stockholders, it would lead to ruinous and disastrous consequences, inasmuch as the creditors of said company would endeavor to reach the amounts due to said company under such additional call from its solvent stockholders, and much thereof would be lost in the expenses of litigation, and an equitable

and just division thereof among the creditors would be wholly defeated, as said defendants are advised that a large part of the debts of said company are too small to justify the holders of them, who are poor men, in entering upon such a race of diligence.

And said defendants are advised that it will be necessary to resort to the residue of said subscriptions in order to provide the requisite means to pay the debts of said company, and that said subscriptions, so far as the same are unpaid, constitute a trust fund for the payment of the debts of said company, and that the same can and ought to be collected and so applied.

And that inasmuch as the stockholders reside within different jurisdictions it is impossible for the creditors to make them all defendants in any one court and compel an equitable contribution from them to raise a fund sufficient to pay the debts of said company.

And that to proceed against the stockholders who are within the jurisdiction of each court would increase litigation and would lead to other injurious consequences, for said defendants are advised that should the creditors proceed against the stockholders within the jurisdiction of any one court they would be entitled to compel said stockholders to contribute to the extent of their unpaid subscriptions, without reference to the contribution that should be made by other stockholders not within said jurisdiction, and would force those so compelled to contribute to resort to stockholders
211 elsewhere for contributions and indemnity, and thus greatly multiply litigation and expense.

And the said defendants are advised that in view of the difficulties and embarrassments which have attended the efforts of said trustees to collect so much of the debts of said company as was intended to be conveyed to them by said deed of trust, and in view of the further and additional difficulties that would attend any attempt on the part of said trustees to collect any new call to be made by said company, and in view of the ruinous expense, loss, and injustice that would attend an attempt on the part of said company to collect such new calls as debts due to itself, and in view of the necessity there is that resort must be had to the subscribers to provide means for paying the debts of said company, and in view of the expense, multiplicity of litigation, and other difficulties that would attend the proceeding of the creditors against said stockholders direct in the different States and jurisdictions in which said stockholders reside, and in view of the unquestionable right of said creditors in some form to compel payment from said stockholders, the said creditors are entitled to the interposition of a court of equity for their relief.

And said defendants are advised that said creditors are entitled to have an account taken of the debts of said company and of the assets now available for the payment of the same other than the unpaid subscriptions, and that they are entitled to have an ascertainment of the amount of said uncalled-for and unpaid subscriptions which will be required to provide means for the payment of the debts of said company in full, and that in ascertaining the

amount so required a proper allowance should be made for probable losses by reason of insolvency of stockholders and otherwise and for the expenses of collecting the same and for the expenses of this proceeding, and to have a decree requiring said company to make a call or assessment upon its stockholders sufficient to provide said necessary amount, and to have the debts created by such call placed in the hands of some person or persons to be appointed by this court, with adequate authority and power to sue for, collect, and receive the same, and bring the same into this court to await its further order.

And said defendants admit that before the questions relating to the powers, rights, and obligations of said trustees under said deed of trust can be finally decided there is imminent danger that a large part of the said subscriptions to the stock of said company may be lost by the insolvency of the subscribers and other causes.

And that the creditors are entitled to have said deed of trust pronounced upon and construed by this court, and to have the powers and duties of the trustees thereunder and the rights of the creditors ascertained and defined.

212 And said defendants are advised that, as said company is a Virginia corporation, and as said deed of trust conveys nothing but personal property, whatever force and effect may be given to the same by the law of this State will be respected and enforced in the courts of other States when said deed may be drawn in question.

And, so said defendants are advised, that the creditors of said company are entitled to have the judgment of this court as to the validity and scope of said deed of trust under the laws of Virginia.

And said defendants admit that there has not been recently any election of officers by said company, but said defendants are advised that under its charter and the laws of Virginia the officers of said company last elected remain such officers until the election and qualification of their successors, and are competent to exercise the powers of such officers.

And said defendants are further advised that under the laws of Virginia the corporate franchises of said company and its existence as a corporation continue in full force and effect until the affairs of said company shall have been fully settled and its debts paid.

And said defendants admit that William H. Perot, of Baltimore, is the president of said company; —— ——, of ——, is the vice-president thereof, and that the board of directors thereof are William Devries and D. J. Foley, of Baltimore; M. G. Harman, of Staunton, Virginia; Joseph R. Anderson, of Richmond; F. P. Zimmerman, of Augusta, Georgia; J. Carter Marbury, of Washington, D. C.; Wm. H. Webb, of New York city, and Lorenzo Norvell, of Lynchburg, Virginia, or that such of said persons as are now living constitute said board of directors.

Further answering (the defendant Hoge herein answering upon information and belief only), these defendants allege and show to the court that said The National Express and Transportation Company continued to carry on its regular and usual express and transporta-

tion business for some time after the execution and delivery to said trustees of said deed of trust of September 20th, 1866; that the defendant Kelly was theretofore and in the year 1866 the vice-president of said The National Express and Transportation Company, and that in or about the month of August, 1866, the defendant Kelly was appointed to be the general superintendent of said company, thereafter having and exercising general charge of and supervision over the affairs and business of said company; that as such officer of the company and in one or the other of said capacities the defendant Kelly had, during the time the company was carrying on a general transportation business, frequent and free access to and use of the books of the company kept, whether at the principal office of the company or at its branch offices, and, in fact, frequently saw and consulted many or all of said books; that until in or about
213 the month of November, 1866, the said books were in the charge and custody of the several officers or employees of the company, whose duty it was to keep and write up such books, respectively; that in or about the month of ——, 1866, such of said books as show the liabilities and assets of the company, the list of subscribers to the capital of the company, the shareholders of the company, the minutes of the proceedings of meetings of shareholders or directors of the company, the assessments levied upon the subscribers or shareholders, the amounts of such assessments paid in and who made such payments, and generally the books and papers needed by any one who would attempt to enforce against subscribers or shareholders the liabilities of the company, passed into the charge and custody of the late Thomas G. Pratt, of Baltimore city, Maryland, who had been theretofore appointed by decree of a Maryland court to be receiver of the assets, &c., of said company; that said books, as the defendants are informed and believe, remained in the charge and custody of said receivers until in or about the month of ——, in the year 1867, when said decree of the Maryland court was revoked and vacated and said books were surrendered and delivered to the defendant Kelly, in whose charge and custody they have ever since remained and been in the city of New York *New York;* that said defendant Kelly has never heretofore afforded or authorized the use of or any access to said books or papers or any of them to any creditor of the company or to any other person whatever, except the attorney and counsel of said trustees and the attorney and counsel of the said company in the city of New York, who was, as these defendants are informed and believe, heretofore duly elected and retained by the company in and about the various litigations in which the company has since the autumn of the year 1866 been a party in New York, and who has remained to this day the attorney and counsel for the company and in charge of such litigations in the company's behalf in New York, and that, as far as these defendants know or are informed, no creditor of the company has, in fact, consulted, had access to, or seen the said books or papers or any of them since they came into the custody of the defendant Kelly as aforesaid.

Further answering, these defendants show to the court that many

and various proceedings, chiefly in the courts of Maryland or in the courts of New York, have (in which States a large part, if not the larger part, of the outstanding shares of said company are held), since the 20th day of September, 1866, been conducted by the company and by the said trustees, at a large expense for counsel and otherwise, in the effort to establish the rights of the company and of the trustees against persons indebted to the company, but that in New York there is an injunction yet in effect, issued
214 by the supreme court of that State, enjoining both the company itself and the said trustees from collecting any debts whatever due to the company in that State, the action in which said injunction was granted having been brought by one of the shareholders in his own behalf and in behalf of all others and the same being now still pending, whilst the trustees are without funds to defray the further expenses of counsel and otherwise which will be necessarily incurred in and by further proceedings in that suit, in which the officers of the company have heretofore and for several years held aloof and afforded the trustees no assistance whatever, and that the situation in Maryland and in other States is, as these defendants are informed and believe, very similar to that in New York, no practical success having as yet been had in efforts to collect the amounts due the company or the trustees by debtors residing there, the officers of the company doing nothing for the benefit of the creditors of the company, and the trustees themselves being without funds to continue in active performance of their trust in the teeth of the determined and alert opposition of the company's shareholders everywhere to *and* any and every attempt heretofore made to compel them to meet and liquidate their liabilities.

Further answering, the said defendants, John Blair Hoge and John J. Kelly, the surviving trustees as aforesaid, say that they have, and each of them separately for himself says that he has, no money belonging to said company or to any creditor of said company now in possession or under control, and that they have no other property of said company in possession or under control, except that the defendant Kelly has, as aforesaid, custody and charge of certain books and papers of the company hereinbefore mentioned or referred to, and that any account which may now be rendered or stated by these defendants would show these defendants are themselves out of pocket in the effort to perform the said trust, each of these defendants having necessarily expended in the said efforts to perform his duties as such trustee an amount of money considerably in excess of any and all the inconsiderable moneys he has been able to collect under said deed of trust, the great body of the debts of the company remaining meantime unpaid.

And these defendants submit to this honorable court that all and every the matters in the said complainant's bill mentioned and complained of are matters which may be tried and disposed of at law, &c., &c.

And these defendants deny all unlawful combinations and confederacy in the said bill charged, without that, &c., &c.

STATE OF VIRGINIA:

John J. Kelly, being duly sworn, says that he is the de-
215 fendant of that name in the action above entitled, and is one of the trustees named in said deed of trust; that he has read the foregoing separate answer made by him and by the defendant, John Blair Hoge, as surviving trustees, to the complainant's bill, and that he knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

Sworn to before me this 26th day of April, 1880.

O. G. KEAN, *N. P.*

The answer of John Blair Hoge referred to in foregoing decree as filed Dec'r 14th, 1880, is in the words and figures following, to wit:

Answer of J. B. Hoge.

The answer of John Blair Hoge, trustee, to an original and an amended and supplemental bill filed against him and others by W. W. Glenn, &c., suing, &c., against the National Express and Transportation Company and others in the chancery court of the city of Richmond.

This respondent, saving, &c., for answer says that he adopts in the main the answer of his codefendant and trustee, John J. Kelly; that he is now a judge of one of the circuit courts of the State of West Virginia, and is so situated that he could not give active and personal attention to the business involved in this litigation and is willing to resign his trust, and does hereby resign it, if deemed necessary and proper by the court, but that he is willing, nevertheless, if the continuance of his trusteeship should be considered advantageous to the ends of justice in attaining the objects of the suit, to allow his name to be used as such trustee and to perform such active duties of his trust as may not be incompatible with his judicial duties as one of the judges of the circuit court of West Virginia.

And now, having fully answered, &c., this respondent prays to be hence dismissed, &c.

JOHN BLAIR HOGE.

Affidavit to the foregoing answer is hereby waived.
July 5th, 1880.

JOHN HOWABD, *P. Q.*

216 The amended and supplemental answer of John J. Kelly referred to in foregoing decree is in the words and figures following, to wit:

A. & Sup'l Answer of John J. Kelly.

The amended and supplemental answer of John J. Kelly to an original and amended and supplemental bill filed against him and others in the chancery court of the city of Richmond by W. W. Glenn and his administrator, suing for the creditors of the National Express and Transportation Company.

This respondent, for further answer to the said bill, says that he is willing to resign and renounce, and does hereby resign and renounce, his office as one of the trustees in the deed in the proceedings mentioned, bearing date the 20th day of September, 1866, made by the said National Express and Transportation Company to John Blair Hoge, C. Oliver O'Donnell, and himself in trust for the benefit of his creditors; but respondent prays that when funds shall come under the control of the court in this cause he may be reimbursed for the sums expended by him and for his services in the performance of his duty as trustee.

And now, having fully answered the said bills, he prays hence to be dismissed.

JOHN J. KELLY.

The within answer may be received without affidavit.
Nov. 30th, 1880.

JOHN HOWARD, *P. Q.*

The amended and supplemental report of Com'r Otho G. Kean, referred to in foregoing decree and dated December 8th, 1880, and the exhibits therewith are in the words and figures following, to wit:

Amend'd & Supple. Report.

GLENN'S ADM'R *v.* NATIONAL EXPRESS & TRANSPORTATION CO.

COMM'R'S OFFICE, No. 1113 MAIN STREET,
RICHMOND, *Dec'r 8th*, 1880.

To the Hon. Ed. H. Fitzhugh, judge of the chancery court for the city of Richmond:

By request of John Howard, Esq., of counsel for W. W.
217 Glenn's adm'r, and, as I am informed, with the approval of the court, I now submit the following as a supplement to my report filed in this cause June 19th, 1880:

I. Herewith returned are four papers marked, respectively, "A," "B," "C," and "D." They are extracts taken from the record book of the board of directors of the defendant company. I have carefully compared them with the originals in said book and find and hereby certify them to be true copies.

II. In my former report, filed June 19th, 1880, a statement was rendered showing an assignment of 20 per cent. on the par value of

unpaid stock—being 80 per cent. of the par value of the original stock—was considered enough to satisfy the debts due by the defendant company. This statement should be changed, I think, in two particulars: First, the assessment, whatever it be, should be laid on the par of the stock and not on that amount less assessments heretofore made. In other words, the par or face value of the company's stock should furnish the basis of the assessment. Secondly, on reflection I am satisfied that the 20 per cent. assessment suggested, if not recommended, in my former report is too small, and that the same should be increased to 30 per cent., if such increase is within the discretionary power of the court. The reasons seem sufficiently obvious. The stockholders, by whom the enormous debt of the defendant company is due, are very numerous; as shown by evidence in the cause, they are widely dispersed; many are, doubtless, insolvent, many dead, and consequently the proceedings necessary to enforce any assessment laid by the court must be exceptionally expensive. The assessments should provide for these costs, &c. Moreover, as many of the debtors are insolvent, any assessment aggregating the exact amount of the defendant's liabilities would manifestly fail to satisfy them, and thus a second and perhaps a third might become necessary, each attended with its heavy costs and expenses. It would seem better, therefore, in the interests of debtor as well as creditor, that an assessment should be laid at the start on which enough may — realized to satisfy the debts of the company, and this is accordingly recommended. Should more than enough be collected on a 30 per cent. assessment, it will be more easy, as well as less expensive, to return the overplus to the stockholders than it would be (in the event of deficiency) to collect a second one.

The following statement is based on the foregoing views:

Par value of 40,044 shares at one hundred doll's per share	$4,004,400 00
On which an assessment of 30 per cent. would give (for payment of the company's debts and the costs and expenses of collection)	1,201,320 00

218 This sum greatly exceeds, it is true, the amount of debt which, with probable costs, is about $650,000.00, but I fix the assessment at 30 per cent. because I think it safe to assume that not more than 50 per cent. of any assessment will be realized.

Respectfully submitted, OTHO. G. KEAN, *Comm'r.*

Fee, $10.

EXHIBIT "A" with Com'r Kean's Supp'l Report, Dated Dec'r 8th, 1880.

Extract from proceedings of the board of directors of the National Express and Transportation Company at a call meeting held Nov'r 1st, 1866.

(Page 149.)

The resignation of Mr. Echols was offered and accepted.

Mr. Joseph R. Anderson, of Richmond, was unanimously elected a director, vice Echols, resigned, and took his seat.

* * * * * * *

(Page 151.)

Resolution Offered by Mr. Anderson.

Resolved, That the president or, in his absence, the vice-president be instructed to apply to the General Assembly of Virginia, if practicable, on the first day of the ensuing session, to make such amendments of the charter as were indicated by the stockholders at their recent meeting, and in addition thereto an amendment authorizing the company to buy in the stock of delinquent stockholders if, upon legal advice, there be no objection thereto.

Adopted unanimously.

M. G. HARMAN,
Vice-President.
J. V. H. ALLEN,
Secretary.

STATE OF VIRGINIA, }
City of Richmond, } *To wit:*

I do hereby certify that the above is an extract from the
219 record of the board of directors of the National Express and Transportation Company, with which the said extract has been by me carefully compared and found correct.

Given under my hand this 8th day of December, 1880.

OTHO. G. KEAN,
Comm'r Chancery Court, Richmond.

EXHIBIT "B" with Com'r Kean's Supp'l Report, Dated Dec'r 8th, 1880.

Extract from by-laws and regulations of the National Express and Transportation Company adopted by the board of directors Dec. 6th, 1866.

8th by-law, page 47 of record:

"A majority of the directors shall be necessary to form a quorum for the transaction of business, but a less number than five directors may adjourn from time to time until a majority be present.

"Vacancies in the board caused by death, resignation, or disqualification shall be filled by a majority of the votes of all the remaining directors."

J. E. JOHNSTON, *President.*
P. T. MOORE, *Secretary.*

STATE OF VIRGINIA, *City of Richmond,* } *To wit:*

I do hereby certify that the above is an extract from the record of the board of directors of the National Express and Transportation Company, with which the said extract has been by me carefully compared and found correct.

Given under my hand this 8th day of December, 1880.

OTHO G. KEAN,
Comm'r Chancery Court, Richmond.

EXHIBIT "C" with Com'r Kean's Supp'l Report, Dated Dec'r 8th, 1880.

Adjourned meeting.

BALTIMORE, *Sept. 18th,* 1866.

220 Present: J. E. Johnston, president; Austin Dall, H. G. Fant, D. J. Foley, Wm. Devries.

By Mr. ——:

Resolved, That the president of this company be, and is hereby, directed to execute and acknowledge for record a deed conveying all the property of this company of every species whatsoever to John Blair Hoge and John J. Kelly, in trust, to secure its creditors upon such terms as he may deem equitable, substantially in accordance with the draft of the deed submitted to this meeting of the board, and with special regard to the pledges of the company already made to the Bank of Commerce of Baltimore and to the Baltimore and Ohio Railroad Company.

The said deed will be delivered to the trustees named therein and recorded as soon as practicable.

Adopted unanimously.

On motion, meeting adjourned.

J. V. H. ALLEN, *Secretary.*

STATE OF VIRGINIA, *City of Richmond,* } *To wit:*

I do hereby certify that the above is an extract from the record of the board of directors of the National Express and Transportation Company, with which the said abstract has been by me carefully compared and found correct.

Given under my hand this 8th day of December, 1880.

OTHO G. KEAN,
Comm'r Chancery Court, Richmond.

EXHIBIT "D" with Comm'r Kean's Supp'l Report, Dated Dec'r 8, 1880.

Copy of resolutions of board of directors of the National Express and Transportation Company passed at an adjourned meeting held Aug. 9th, 1866.

Ordered, That there be appropriated and set apart one-half of the first receipts from assessments on stock, old and new, to be
221 paid over ratably to the Baltimore and Ohio Railroad Company and to the Bank of Commerce, in proportion to their respective claims against the company; and if in this way said debts be not paid within fifty (50) days, or at any time sooner if required by said railroad company or bank, the president of this company is directed to execute and deliver any assurance, mortgage, assignment, or conveyance which the counsel of said bank and railroad company or the counsel of either of them may advise for the more perfect security of said railroad company and bank and to save them harmless in any contingency; and the treasurer of this company is hereby directed to regard such receipts as specifically appropriated to these purposes and to pay over the same as stated without further order, said assurance, mortgage, assignment, or conveyance to cover any property, effects, or claims of this company that may be designated by said R. R. Co. and bank or either of them. No other lien on the property, effects, or claims of this company shall be given or allowed so as to interfere with the honorable obligations involved in this proposition.

That the president of this board cause to be delivered to said R. R. Co. and bank each a duly stamped copy of the foregoing order as an engagement and agreement of this company in consideration of forbearance to fulfil the above stipulations in regard to the security of their debts.

Adopted unanimously.

STATE OF VIRGINIA, }
City of Richmond, } *To wit:*

I do hereby certify that the above is an extract from the record of the board of directors of the National Express and Transportation Company, with which the said extract has been by me carefully compared and found correct.

Given under my hand this 8th day of December, 1880.

OTHO G. KEAN,
Comm'r Chancery Court, Richmond.

The following paper was filed in this cause on the 14th day of December, 1880, and the same is as follows:

Act of Incorporation and Amendment.

An act to amend and re-enact an act to incorporate the
222 Southern Express Company, passed March 22d, 1861, and to incorporate the National Express and Transportation Company, passed December 12, 1865.

Be it enacted by the General Assembly of the State of Virginia, That the act passed March twenty-second, eighteen hundred and sixty-one, entitled An act to incorporate the Southern Express Company, be amended and re-enacted so as to read as follows:

"1. Be it enacted by the General Assembly of Virginia, That Joseph E. Johnston, William L. Montague, William J. Hawkins, M. G. Harman, Francis Skiddy, Charles W. Purcell, L. W. Glazebrook, John Echols, and Benjamin Hart and their associates, successors, and assigns be, and they are hereby, declared to be a body corporate and politic by the name of the National Express and Transportation Company for the purpose of an express and transportation business, and as such shall have perpetual succession and a common seal, which it may alter or renew at pleasure, and may sue and be sued, implead and be impleaded, contract and be contracted with, purchase, hold, and grant such estates, real and personal, as may be necessary for the carrying on of the legitimate business of said company, and make ordinances, by-laws, and regulations for the government of all under its authority and the proper conduct of its affairs.

"2. The capital stock of said company shall be five millions of dollars, and shall be divided into shares of one hundred dollars each; but the said capital stock may from time to time, by order of the board of directors, be increased to a sum not exceeding ten millions of dollars.

"3. The said company may commence business as soon as one-third of its capital stock is subscribed and one hundred thousand dollars of same is paid up; and on such subscriptions being made any five of the stockholders may call a general meeting of the stockholders of the said company by advertising the time and place of such meeting, at least twenty days before the time of holding the same, in three of the daily newspapers of Richmond: Provided, however, That any other mode or time of calling such meeting shall be lawful if two-thirds of the stockholders are represented thereat. At the meeting convened as aforesaid the said company shall elect, by a majority of the votes then present or represented, not less than five nor more than nine persons, being stockholders of the said company, to act as directors, who shall represent the said company and manage the business thereof.

"4. The board of directors shall, at their first meeting after their election, elect one of their number as president of the said corporation, and may elect such other officers as they may deem
223 advisable. The president and directors of this corporation shall hold their offices for one year and until their successors

are chosen. Vacancies in the board of directors shall be filled in such manner as the by-laws of the corporation may prescribe.

"5. The annual election of directors and other officers of this corporation shall be held at such place and in such manner as its by-laws may prescribe.

"6. The said company shall have power to do an express and general transportation business, by land or by water, for the conveyance of persons and property of every kind throughout or beyond the limits of Virginia, in their own conveyances or in those of such other persons or corporations as they may contract with, and to create and organize branch agencies for the same purpose, and to form any such arrangement, purchase, or union with any other express or transportation company as may in their opinion be advantageous, and to build, hire, establish, and maintain store-houses and other buildings for the safe keeping of the property entrusted to their care for transportation, and shall have power to indemnify themselves by insurance against any loss or damage by fire or the risks of navigation or transportation on any property held either in their own right or as bailees.

"7. The said company shall have power to sell all freights or baggage, if the same remain unclaimed more than one year, in its possession; but such sale shall be at public auction and after notice for not less than four weeks in one or more newspapers published at or nearest the place of sale; and if such freights or baggage are of a perishable nature it may be sold as soon as necessary. Said notice shall contain, as near as practicable, a description of such freight or baggage, the place and time of its deposit with the company, together with the name and residence of the owner or consignee of the same, if known. The proceeds of such sale shall be applied to the satisfaction of all charges upon the said unclaimed freight or baggage arising from its storage, transportation, and sale. The residue, if any there be, shall be held in trust for the owner; and it shall be the duty of the said company to keep at its principal office a faithful record of all proceedings had under this power of sale, which record shall be open to the inspection of all claimants.

"8. The principal office shall be kept at Richmond, Virginia, unless the same be changed to some other place by a vote of two-thirds of the directors; and the said company may establish as many local offices as the president or board of directors may deem necessary.

"9. The right to the franchise granted by this act shall rest as soon as one-third of the capital stock is subscribed and one hundred thousand dollars of the same shall be paid up. Of these facts it shall be the duty of the company to inform the Governor,
224 as the officers of banks about to be put into operation are required to do.

"10. This act shall be in force from its passage, and shall be subject to modification or repeal at the pleasure of the General Assembly."

OFFICE OF KEEPER OF ROLLS OF VA.

I hereby certify that the foregoing act of Assembly is a true copy from the roll in my office. This 30th day of November, 1880.

P. H. McCAULL,
Clerk House of Delegates and Keeper of the Rolls of Virginia.

An act to amend the 8th section of an act entitled An act to amend and re-enact an act to incorporate the Southern Express Company, passed March 22, 1861, and to incorporate the National Express and Transportation Company, passed December 12, 1865. Passed December 18, 1865.

1. Be it enacted by the General Assembly of Virginia, That the eighth section of the act passed December twelfth, eighteen hundred and sixty-five, entitled An act to amend and re-enact an act to incorporate the Southern Express Company, passed March twenty-second, eighteen hundred and sixty-one, and to incorporate the National Express and Transportation Company, be amended and re-enacted so as to read as follows:

§ 8. The principal office shall be kept at Richmond, in Virginia, unless the same be removed to some other place within this Commonwealth by order of the stockholders in general meeting, and the said company may establish as many local offices as the president or board of directors may deem necessary.

2. This act shall be in force from its passage.

OFFICE OF KEEPER OF ROLLS OF VA.

I hereby certify that the foregoing act of Assembly is a true copy from the rolls in my office. This 30th day of November, 1880.

P. H. McCAULL,
Clerk House of Delegates and Keeper of the Rolls of Virginia.

The following is the opinion of court referred to in the foregoing decree of December 14th, 1880:

225 *Opinion of Court.*

GLENN'S ADM'R *v.* THE NATIONAL EXPRESS AND TRANS. CO., &c.

This suit was instituted in 1871, but nothing seems to have been done in it until the spring term of this court of 1879, when leave was asked and obtained to file an amended and supplemental bill.

This inaction was caused, it is alleged, by reason of litigation pending in other States; but after the filing of the amended and supplemental bill, in August, 1879, the cause has been actively prosecuted by the plaintiff. As soon as it matured for hearing it was referred to one of the master commissioners of the court to ascertain and report to the court an account of the debts and liabilities of the company, and also a statement of its assets.

Due notice of the enquiries ordered to be made by the master commissioner was given by publication in a newspaper then published in the city of Richmand.

The master commissioner, after examining the books of the company and other documentary evidence and taking the depositions of numerous witnesses, has made his report, showing an aggregate indebtedness of the company on the 1st day of June, 1880, of $509,392.41.

There is no exception to this report. It appears to be correct in all respects in regard to the indebtedness of the company, and must therefore be approved and confirmed as to said indebtedness.

Regarding the indebtedness of the company as above indicated to be established, the question arises, How is it to be paid?

By a deed dated on the 20th day of September, 1866, the company conveyed all of its estate and property of every description to trustees to secure the payment of its debts, and the answer to the question just mentioned depends largely upon the validity, construction, and enforcement of that deed.

I. The court is clearly of opinion that the said deed is valid.

This corporation was chartered by the Legislature of Virginia and had its principal office in the city of Richmond, the capital of the State, and though by the 8th section of act of incorporation power was given to two-thirds of the directors to change the locality of the principal office without restriction as to State boundaries, yet by an amendment to the charter, passed December 18th, 1865, this was limited to removal to "some other place within this Commonwealth," and power was given to establish local offices anywhere.

This company, therefore, is a Virginia corporation, and as well by positive statute as by an inherent legal incident of its existence it is domiciled in Virginia, though it may and was designed to
226 do business elsewhere as well. Bank of Augusta *v.* Earle, 13 Peters, 519; Paul *v.* Virginia, 8 Wall., 186.

The deed in question was executed, acknowledged, delivered, and recorded in the city of Richmond, Virginia, as is shown by the certificate in Richmond of the notary public, Roger J. Page, bearing even date with the deed, and by the certificate of Robert Howard, clerk of the hustings court of Richmond, of the recordation of the deed on the day following, and, as will be seen, it was executed by the president of the company by virtue and in pursuance of a resolution of the board of directors, in whom the whole management of the affairs of the company was vested, conferring upon him full authority and power for that purpose. It is, therefore, the deed of a Virginia corporation, under its corporate seal, and by proper authority duly made and delivered in Virginia, and its validity and effect should be determined by the laws of this State.

It purports to convey all of the property of the company in trust for the benefit of all its creditors, and this it was perfectly lawful and proper to do. It gives preferences to some creditors over others, but no law is better established in Virginia than that such preferences are legal; and this will be of no practical importance if the assets of the company be sufficient to pay its debts.

It retains for a limited time possession in the company of the

property conveyed, but that this may be done is equally well established law in Virginia.

After repeated decisions of the supreme court of appeals of this State establishing the validity of such deeds the court entertains no doubt as to the legality and binding effect of this deed in all respects. The decision of the supreme court of Maryland, based upon some of these Virginia decisions, and the testimony of many of the prominent counsel of the bar of this court given as experts as to the law of Virginia in respect to this deed and establishing the validity of the deed was, in the judgment of this court, plainly and clearly correct. See Balto. & Ohio R. R. Co. *v.* Glenn, 28 Maryland R., 287.

II. The validity of the deed being established, the next question is, What was its legal effect? What were the terms of the conveyance and what did it convey?

It is evident from the report of the commissioner and from the face of the deed that the company was greatly embarrassed financially, and that its general and leading object in executing the deed was to dedicate all of its assets and effects of every kind to the payment of its debts. Accordingly, to accomplish this purpose, it says: "The party of the first part doth hereby grant, bargain, sell, convey, assign, and set over unto the said parties of the second part (the
227 trustees) all the estate, property, rights, and credits of the said party of the first part of every kind, wheresoever situated, in or out of the State of Virginia."

It is difficult to conceive of larger and more comprehensive words of description of the property and rights and credits thus conveyed and assigned. But the deed does not stop there; it proceeds to make a general enumeration of the things and rights conveyed and assigned, thus: "Including leases, horses, wagons, carts, harness, office furniture, safe, chests, fixtures, and other effects, and moneys payable to the company, whether on calls or assessments on the stock of the company or on notes, bills, accounts, or otherwise, which property and moneys are enumerated and set forth in a schedule, to be marked A and annexed hereto, as soon as can be conveniently done, but the omission of any property from such schedule is not to prevent the same from being hereby granted or assigned."

Here is an express enumeration of "moneys payable to the company, whether on calls or assessments of stock of the company or on notes, bills, accounts, or otherwise," and though no schedule was ever made or annexed to the deed, yet the distinct reference to such a schedule as is described, with the statement that the "omission of any property, money, or other thing from such schedule is not to prevent the same from being hereby granted or assigned, is ample proof that it was the object, intent, and meaning of the company to convey all of its estate, rights, and credits of every kind in trust for the payment of its debts; and in the deed it made and executed it used language which has been held by the courts to be apt and sufficient to pass everything the company owned or to which it was entitled, inclusive of the estate, property, rights, and credits of the company of every kind and wherever situated. See Maitland *v.* Newton, 3 Leigh 714; citing Comegy's *v.* Vasse, 1 Peters, 193

Mundy *v.* Vawter, 3 Grat., 518; Griffin *v.* Macauley, 7 Grat., 477; Wickham *v.* Lewis, Martin & Co., 13 Grat., 427, 437, 438; Milner *v.* Metz, 16 Peters, 221.

And the same principle seems to have prevailed in the bankrupt court, where the register assigns and conveys all the estate, real and personal, of the bankrupt. The decisions in such cases appear to be uniform that the right to receive unpaid subscriptions to the capital stock of a bankrupt corporation passes by the act of Congress and the register's deed to the assignee in bankruptcy. Indeed, no question seems to have been made upon the subject, and the cases seem to have proceeded upon the assumption that such right was vested in the assignee. See Sanger *v.* Upton, assignee, 91 U. S. R., 56; Upton, assignee, *v.* Tribilcock, *idem*, p. 45; Turnbull *v.* Payson, 95 U. S. R., 418; Pullman *v.* Upton, 96 U. S. R., 328.

By chapter 57, section 3, p. 546, of the Code of Virginia of 1873 (which is a reprint in this respect of the like chapter in the Code of 1860) it is provided that "upon every subscription for
228 shares in any joint-stock company (other than a bank of circulation) there shall be paid upon each share two dollars at the time of subscribing, and the residue thereof as required by the president and directors." A subscription to such stock obviously creates a debt or obligation, of which two dollars a share are payable *in presenti* and the residue *in futuro*. This residue is an express credit extended by the company to the stockholders, and the company has a plain legal statutory right to demand payment whenever it may be needed, or, as the statute declares, "as (when) required by the president and directors." And it is further provided by the statute—see chapter 57, section 23, p. 550, Code of 1873; same chapter, section 21, p. 334, Code of 1860—that if any money which any stockholder has to pay upon his shares be not paid as required by the president and directors, the same, with interest thereon, may be recovered by warrant or action, according to the amount, or by motion in lieu of an action; so that the statute not only recognizes such a subscription as a debt to the company—an express credit intended by the company to the stockholders—but it provides the remedy for its recovery by legal proceedings; and, independently of the statute, it seems that on general principles such subscriptions are recognized by the courts as debts due to the company which the company has the right to recover of the stockholders, and which are to be regarded as a fund which the corporation holds for the payment of its debts. See Marsh, &c., *v.* Burroughs, Wood's Cir. Ct. R., pp. 468, 479; Hatch *v.* Dana, 101 U. S. R., pp. 210, 211.

The court is clearly of the opinion that the broad and comprehensive terms of the deed embraced the unpaid subscriptions of stock, and that it conveyed and transferred to the trustees, for the purposes of the trust, the right to receive, when called for, all such unpaid subscriptions, and that the deed carried all the credits belonging to the company in that respect; and the court is further of opinion that, inasmuch as the president and directors have failed and omitted to make those rights and credits of the company available to its creditors by making a call and assessment upon the stock-

holders, it is the duty of the court, under the law, to effectuate those rights and collect and appropriate those credits in such manner and by such means as may be necessary and proper for the execution of the trusts of the said deed.

III. Having decided that the deed is valid and that it embraced all the property, rights, and credits of the company, it remains to be considered how the rights of the creditors are to be enforced.

It seems, from the proceedings in this case, that the great bulk of the property, effects, and claims of the company consists of unpaid subscriptions to its capital stock, and the creditors must look entirely to this fund for the payment of their debts.

As to 80 per cent. of the stock, the subscription is wholly
229 unpaid, and the president and board of directors have made no call or assessment on the stockholders and no order whatever in regard to the collection of any part of this unpaid subscription, and for many years they seem to have entirely abandoned the business of the company. It is charged that neither the directors nor the stockholders of the company have had a meeting for nearly fourteen years; but, although the company has ceased to do business and the president and directors no longer give attention to its affairs, the corporation has not become extinct. Under the statute of Virginia, chapter 56, section 31, p. 543, of the Code of 1873, "such corporations may sue and be sued as before for the purpose of collecting debts due to it, prosecuting rights under previous contracts with it, and enforcing its liabilities and distributing the proceeds of its works, property, and debts among those entitled thereto;" and by sect. 4 of the charter of this company (acts 1865–'6, p. 380) it is expressly provided that the president and directors of this corporation shall hold their offices for one year and until their successors are chosen; and see also, to same effect, chapter 57, section 14, Code of 1873, p. 549, where, — the president and directors of the company and the stockholders of the company are in default in making provision for the payment of its debts, it is made the duty of the court to enforce payment of the stock subscriptions to an extent sufficient, with any other assets that may be in the hands of the trustees, to pay the debts of the company, the costs of suit, and the expenses incident to the execution of the trusts; for it seems to be well settled that a court of equity may enforce payment of stock subscriptions, though there may have been no calls for them by the company. Hatch *v.* Dana, 101 U. S. R. (11 Otto), 214, 215; Thompson *v.* Stockholders, sects. 15 and 345.

It is to be regretted that the parties themselves have not attended to this duty. They could have acted with a knowledge of all the facts and were in a better position and circumstances to know what was requisite and proper than a court can be. It is very clear that a call and assessment must be made on the stockholders, but it is difficult to determine what it should be.

With the lights now before the court it is deemed most advisable under all the circumstances to accept the recommendations of the commissioner in his supplemental report of December 8, 1880, which is as follows: "In my former report, filed June 19th, 1880, a state-

ment was rendered showing that an assessment of 20 per cent. on the par value of unpaid stock—being 80 per cent. of the par value of the original stock—was considered enough to satisfy the debts due by the defendant company. This statement should be changed, I think, in two particulars. First, the assessment, whatever it be, should be laid on the par of the stock and not on that amount, less assessments heretofore made. In other words, the par or face
230 value of the company's stock should furnish the basis of the assessment. Secondly, on reflection I am satisfied that the 20 per cent. assessment suggested if not recommended in my former report is too small, and that the same should be increased to 30 per cent., if such increase is within the discretionary powers of the court.

"The reasons seem sufficiently obvious. The stockholders, by whom the enormous debt of the defendant company is due, are very numerous, as shown by evidence in the cause; they are widely dispersed; many are doubtless insolvent, many dead, and, consequently, the proceedings necessary to enforce any assessment laid by the court must be exceptionally expensive. The assessment should provide for those costs, &c. Moreover, as many of the debtors are insolvent, any assessment aggregating the exact amount of the defendant's liabilities would manifestly fail to satisfy them, and thus a second and perhaps a third might become necessary, each attended with its heavy costs and expenses. It would seem better, therefore, in the interest of debtor as well as creditor, that an assessment should be laid at the start, on which enough may be realized to satisfy the debts of the company; and this is accordingly recommended. Should more than enough be collected on a 30 per cent. assessment, it will be more easy as well as less expensive to return the overplus to the stockholders than it would be (in the event of a deficiency) to collect a second one."

IV. By the answer of John Blair Hoge and the amended and supplemental answer of John J. Kelley, surviving trustees in the said deed of trust, it appears that they are so situated personally as to be unable to execute the trusts, and they desire to be relieved from the office of trustee. It would be a source of satisfaction to the court if they would continue to act, but inasmuch as they decline to do so they should by proper order be removed from their said office.

It is represented to the court by the counsel for the creditors whose debts have been established that John Glenn, Esquire, of Baltimore, Maryland, is a fit and proper person to be substituted and appointed as trustee to execute the trusts of said deed, and a proper order appointing him as substituted trustee will be entered; but before he undertakes to act in the execution of the trust he will be required to give bond with good security before the clerk of this court, in the penalty of $100,000, conditioned for the faithful discharge of his duties as such substituted trustee.

He will be required from time to time to report his proceedings to the court in the execution of the trust, so that the whole trust shall be executed under the supervision of the court. He will deposit his collections, after paying the necessary costs and expenses incident

to the administration of the trust, in the Planters' National Bank of Richmond, to the credit of the court in this cause, 231–233 or in such other bank as may from time to time be designated by the court.

And the said substituted trustee shall from time to time, not omitting any period of six months, render an account of his transactions before one of the master commissioners of this court, and such commissioner will be directed, upon such settlement being made, to report the same to the court, and upon the coming in of such report, as soon as sufficient sums shall be collected, the court will take order as to the proper distribution of the fund among those entitled thereto.

And at another day, to wit, at a chancery court of the city of Richmond, continued by adjournment and held for said city on the 3rd day of January, 1881.

JOHN W. WRIGHT, Sheriff of the City of Richmond, and as Such Administrator of W. W. Glenn, Deceased, Who Sues on Behalf of Himself and Other Creditors of the National Express and Transportation Company, Pl't'ffs,

against

THE NATIONAL EXPRESS AND TRANSPORTATION COMPANY, W. H. Perot, Wm. Devries, D. J. Foley, J. R. Anderson, F. P. Zimmerman, J. Carter Marbury, Wm. H. Webb, Lorenzo Norvell, M. B. Poitiaux, and John Blair Hoge and John J. Kelly, Trustees, Def'ts.

This day came John Glenn, by John Howard, his counsel, and represented to the court that he had duly executed the bond before the clerk of this court required of him as substituted trustee in the deed of trust in the proceedings mentioned by the decree entered herein on the 14th day of December, 1880, and exhibited to the court the said bond, bearing date the 31st day of December, 1880, with John M. Glenn, John C. Backus, Henrietta R. Glenn, Edward G. Kenly as sureties thereon, executing the same by said John Howard, their attorney-in-fact, and the powers of attorney from the said sureties authorizing the execution of the said bond in their stead by their said attorney-in-fact, accompanied with affidavits of the several sureties of the sufficiency of such security and the recommendation in writing of Charles Marshall and John Howard, attorneys and counsel for the creditors of the defendant company, whose claims were established by the said decree of the 14th December, 1880, that the said sureties be accepted, and the court, being satisfied of the due execution of the said bond in all respects and of the sufficiency of the said sureties, doth hereby approve the said bond and the action of the clerk of this court in taking and accepting the same.

* * * * * * *

[At this point is omitted the clerk's certificate to record, marked Exhibit "A," and index to said record.]

234 And afterwards and on, to wit, the twenty-fifth day of November, A. D. 1885, came again the said defendant, by his attorneys aforesaid, and filed in said court and in said cause his bond on writ of error and sued out of said court a writ of error and citation to the Supreme Court of the United States; and the said bond is in words and figures as follows, to wit:

Bond.

Know all men by these presents that we, William J. Hawkins, C. M. Hawkins, & A. B. Hawkins, are held and firmly bound unto John Glenn, trustee of the National Express and Transportation Company, in the full and just sum of twenty thousand dollars, to be paid to the said John Glenn, trustee as aforesaid, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this twenty-fifth day of November, in the year of our Lord one thousand eight hundred and eighty-five.

235 Whereas lately, at a circuit court of the United States for the eastern district of North Carolina, in a suit depending in said court between John Glenn, trustee of the National Express and Transportation Company, plaintiff, and William J. Hawkins, defendant, judgment was rendered against the said William J. Hawkins, and the said William J. Hawkins having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation, directed to the said John Glenn, trustee as aforesaid, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said William J. Hawkins shall prosecute his writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

W. J. HAWKINS. [SEAL.]
C. M. HAWKINS. [SEAL.]
A. B. HAWKINS. [SEAL.]

Approved by—
AUG. S. SEYMOUR,
District Judge.

236 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Eastern District of North Carolina:

Circuit Court, Fourth Circuit.

JOHN GLENN, Trustee of the National Express and Transportation Company,
vs.
WILLIAM J. HAWKINS.

I, N. J. Riddick, clerk of the circuit court of the United States in and for the eastern district of North Carolina, do hereby certify that the foregoing contains a full, true, and perfect transcript of the record in the above named case, lately pending in said court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in the city of Raleigh, in said district, this 23rd day of March, A. D. 1886.

[Seal United States Circuit Court, Eastern Dist. of N. C.]

N. J. RIDDICK, *Clerk*,
By V. ROYSTER, *Deputy Clerk*.

237 In the Supreme Court of the United States. Oct. Term, 1888.

W. J. HAWKINS, Pl't'f,
vs.
JOHN GLENN, Trustee, Def'd't. } No. 266.

It is agreed that the Exhibit "A" referred to in the bill of exceptions is a transcript of the proceedings in the chancery court of the city of Richmond in the case of Glenn's adm'r *et al. vs.* The National Express and Transportation Company, certified under the act of Congress, down to and including the decree of said court passed on the third day of January, 1881.

It is further agreed that in printing said exhibit the clerk of the Supreme Court shall omit therefrom such parts as he may be directed to omit by counsel of the parties to the suit and substitute for the part so omitted such statements of their contents and tenor as he may be directed to substitute by said counsel.

It is further agreed that either party may refer to the full transcript of the record of said case down to and including said decree of January third, 1881, in the argument, in which event the defendant in error shall furnish to the judges of the Supreme Court
238 printed copies of said record if so required by the judges of said Court.

CHARLES MARSHALL,
Counsel for John Glenn, Trustee, Defend't in Error.
S. F. PHILLIPS,
Counsel for Hawkins, Pl't. in Error.

[Endorsed:] In the Supreme Court of the United States. W. J Hawkins *vs.* John Glenn. Agreement of counsel.

239 *Instructions to the Clerk of the Supreme Court for Printing the Record in the Above Case.*

Oct. Term, 1888, of the Supreme Court of the United States.

W. J. HAWKINS, Pl't.,
v.
JOHN GLENN, Trustee, D'f't. } No. 266.

The undersigned, counsel for the parties above named, agree that the following changes shall be made in the matter contained in the printed pamphlet, part of the bill of exceptions:

1. Omit the matter beginning: "promissory notes and protests" (inclusive thereof), on page 20, and ending with the word "affidavit" (exclusive thereof), on page 28. In place of such matter insert, within brackets, as follows:

[Accompanying the said declaration were copies of the promissory notes upon which it was based, with the protests thereupon, together with an account stated of the aggregate claim of the plaintiffs, amounting, at that time, to $40,021.84.]

2. Omit matter beginning with, and inclusive of, the words "And at another day," on page 39, down to, but exclusive of, same words on page 44. In place thereof insert, within brackets, as follows:

[At this point are omitted three petitions filed in the cause
240 in behalf of (1) The Baltimore and Ohio Railroad Company, (2) The Bank of Commerce of Baltimore, and (3) The Philadelphia, Wilmington and Baltimore Railroad Company, praying to be made parties plaintiff in the cause, together with orders *with* the court granting such prayers."]

3. Omit "Statement No. 1," beginning on page 46 and ending near bottom of page 79. Substitute therefor, within brackets, as follows:

[At this point is omitted "Statement No. 1," referred to in the commissioner's report, being a detail of various claims which make up the aggregate of $509,392.41 reported as due by the company to numerous individuals.]

4. Omit matter beginning with and inclusive of words "Depositions returned with the commissioner's report," on page 80, down to the bottom of page 156. In place thereof substitute, within brackets:

[At this point is omitted a detail of the depositions taken by the commissioner in support of the above report by him as to the indebtedness of the company and as to the other matters embraced in his report.]

5. Omit matter beginning at and including words "do pay," on line 3, on page 159, down to and including words "until paid," upon the nineteenth printed line from bottom of page 174, and substitute, within brackets:

241 [At this point is omitted the details of the names of numerous creditors of the company, with the amounts decreed to be paid to each, being in all $509,392.41, as above reported by the commissioner.]

6. Omit index to record, Exhibit "A," and certificate to same.

S. F. PHILLIPS,
Counsel for Hawkins, Pla. in Error.
CHARLES MARSHALL,
Counsel for John Glenn, Trustee, Defend't in Error.

242 [Endorsed:] Supreme Court U. S. 1888, October term. No. 266. William J. Hawkins, pl'ff in error, *vs.* John Glenn, trustee, &c. Stipulation and instructions in regard to printing record. Filed Oct. 30, 1888.

Endorsed on cover: E. North Carolina C. C. U. S. No. 266. William J. Hawkins, plaintiff in error, *vs.* John Glenn, trustee of the National Express & Transportation Company. Filed May 7, 1886.

IN THE

Chancery Court of the City of Richmond, Va.

Glenn's administrator, &c.,

v.

National Express and Transportation Co. and others.

IN THE

Chancery Court of the City of Richmond.

W. W. Glenn's administrator, &c.,

v.

The National Express and Transportation Company and others.

VIRGINIA:

PLEAS before the judge of the chancery court of the city of Richmond.

Be it remembered that heretofore, to wit: on the 28th day of November, 1871, came the plaintiff, W. W. Glenn, sueing on his own behalf and of such other creditors of the National Express and Transportation Company as may become parties to this suit and contribute to the expenses thereof, by counsel, and sued out of the clerk's office of the chancery court of the city of Richmond, subpœnas in chancery against the defendants, William H. Perot, president of said company; William Davies, D. J. Foley, M. G. Harman, Joseph R. Anderson, F. P. Zimmerman, J. Carter Mowbray, William H. Webb, Lorenzo Norvell, John Blair Hoge, C. Oliver O'Donnell and John J. Kelly, directed to the sheriffs of the city of Richmond and town of Staunton and returnable to 1st December Rules, 1871; which subpœnas in chancery and returns of the sheriffs thereon are in the words and figures following, to wit:

SUBPŒNAS.

The Commonwealth of Virginia,

To the Sheriff of the city of Richmond—Greeting:

We command you that you summon William H. Perot, president of said company; William Davies, D. J. Foley, M. G. Harman, Joseph R. Anderson, F. P. Zimmerman, J. Carter Mowbray, Wm. H. Webb, Lorenzo Norvell, John Blair Hoge, C. Oliver O'Donnell and John J. Kelly, to appear at the clerk's office of the court of chancery of the city of Richmond, at the rules to be held for the

said court on the first Monday in December, 1871, to answer a bill in chancery, exhibited against them in our said court by W. W. Glenn, sueing on his own behalf and of such other creditors of the National Express and Transportation Company, a company chartered and incorporated under the laws of the state of Virginia, as may become parties to this suit and contribute to the expenses thereof. And have then there this writ.

Witness, Benjamin H. Berry, clerk of our said court, at the court-house, the 28th day of November, 1871, and in the 96th year of our foundation.

BENJ. H. BERRY.

RETURN.

Executed on Joseph R. Anderson November 25th, 1871, by delivering him a true copy of the within *spa.* in chan. The others not found.

BENJ. T. AUGUST, D. S.,
For John W. Wright, S. C. R.

Executed in the city of Richmond, said Anderson being a resident of said city.

The Commonwealth of Virginia,

To the Sheriff of the town of Staunton—Greeting:

We command you that you summon W. G. Harman to appear at the clerk's office of the court of chancery of the city of Richmond, at the rules to be held for the said court on the first Monday in December, 1871, to answer a bill in chancery, exhibited against him and others in our said court by W. W. Glenn, sueing in his own behalf and of such other creditors of the National Express and Transportation Company, a company chartered and incorporated under the laws of the state of Virginia as may become parties to this suit and contribute to the expenses thereof. And have then there this writ.

Witness, Benjamin H. Berry, clerk of our said court, at the court-house, the 28th day of November, 1871, and in the 96th year of our foundation.

BENJ. H. BERRY.

RETURN.

Executed December 4th, 1871, as to M. G. Harman, by leaving at his residence in the city of Staunton with a white member of his family over sixteen years of age a copy of this "chy. *spa.*," ex-

plained its purport, and requested that the same be handed to said M. G. Harman on his return, he being from home at the time.

W. L. MAURY, S. A. Co.

And at another day, to-wit: At rules held in the clerk's office of the chancery court of the city of Richmond on the first Monday, being the 4th day of December, 1871, came the plaintiff and filed his bill, which bill and exhibits therewith are in the words and figures fellowing, to wit:

BILL.

W. W. Glenn
vs.
The National Express and Transportation Comp'y and others.

To the Honorable Edward H. Fitzhugh, judge of the chancery court of the city of Richmond.

Humbly complaining, showeth unto your Honor, your orator, William W. Glenn, of Baltimore city, who files this bill on behalf of himself and such other creditors of the National Express and Transportation Company as may become parties to this suit, and contribute to the expenses thereof, that your orator is a creditor of the National Express and Transportation Company to the amount of $42,501.31, with interest thereon from the 24th day of June, 1870, for which sum your orator recovered a judgment against said company, in the superior court of Baltimore city, on the 24th day of June, 1870, as will appear by a short copy of said judgment herewith filed and made a part of this bill, marked Complainant's Exhibit, W. W. G., No. 1, and full transcript of which judgment your orator will produce when thereto required.

And your orator charges that said National Express and Transportation Company was duly incorporated by the Legislature of the state of Virginia on the —— day ——, 1865, as will appear from the act of incorporation found among the printed laws of said state, to which reference is hereby made, and a copy whereof will be produced when required.

And your orator further charges that said company accepted said act of incorporation, and proceeded to conduct its business in pursuance thereof until the 20th day of September, 1866, when said company having become much emba-rassed in its affairs, and owing large debts to various persons, executed a deed of trust for the benefit of its creditors to the defendants, John Blair Hoge, C. Oliver O'Donnell and John J. Kelly, dated the 20th day of September, 1866, which was duly recorded in the city of Richmond, in the city of Baltimore, and elsewhere, and a copy of which is

hereinwith filed, and made a part of this bill, marked Complainant's Exhibit, W. W. G., No. 2.

And your orator further charges that the assets of said company, to which its creditors have to look mainly for the payment of their debts, consist of the amounts contracted to be paid by the subscribers to its capital stock.

And your orator charges that the total number of shares of the stock of said company, which had been subscribed for at the date of said assignment was 40,044, each share being of the par value of $100, and said subscriptions, representing the large aggregate of 4,004,400, and that on the 29th day October, 1866, the condition of said company with reference to its stock and debts was reported at a meeting of stockholders as follows:

There had then been subscribed for of the stock of said company

557	shares	on	which	nothing	had	been	paid.	
1,154	"	"	"	1	per	cent.	had	been paid, but no certificates issued.
2,169	shares	on	which	5	per	cent.	had	been paid.
20	"	"	"	7½	"	"	"	"
8,087	"	"	"	10	"	"	"	"
25	"	"	"	11	"	"	"	"
20	"	"	"	12½	"	"	"	"
250	"	"	"	13	"	"	"	"
12,554	"	"	"	15	"	"	"	"
20	"	"	"	15½	"	"	"	"
15,188	"	"	"	20	"	"	"	"
40,044	shares.							

And your orator charges that the subscribers to the capital stock of said company resided and now reside in many states, and not within the jurisdiction of any one court.

And your orator further charges that by the terms of the subscription, the subscribers were bound to pay the amount of said subscriptions, as and when the same should be called for by said company.

And your orator further charges that the total amount of assessments or calls made by said company upon its stockholders was twenty per cent. of the amount of the subscriptions, and that the amounts paid in money or by notes upon said calls of twenty per cent. are correctly set forth above.

And he is informed and believes, and believing charges that a very small part, if any, of the said assessments to the amount of twenty per cent., which remained unpaid at the date of said report, has been since paid or collected from the delinquent stockholders.

And your orator further charges that no subsequent call or assessment was made upon its stockholders by said company, and that eighty per cent. of the amount of said subscriptions remains uncalled for and unpaid.

And your orator charges that said trustees were not requested to take possession of said trust estate under said deed until on or about the 3rd day of November, 1866, and that in the meantime nearly all of the visible property of said company had been levied upon and taken under legal process by its creditors, and that the amount of the same was wholly insufficient to pay the debts of said company.

And he further charges that said company had hypothecated or otherwise used, and parted with a considerable amount of the notes and other obligations received by it from stockholders on account of amounts due by them on said calls, and he charges that the actual amount of money realized and received by said trustees under said assignment was not sufficient to pay the debts due the preferred creditors of the first class, mentioned in said deed of trust.

And your orator further charges that of the amount of the said assessments upon the subscribers of twenty per cent. a large part cannot be collected at all, by reason of the insolvency of the subscribers, and your orator is informed and believes, and believing charges, that a large part of said assessments has been lost by the lapse of time, and cannot now be collected.

And your orator further charges that as to the debts due upon said unpaid assessments, said trustees allege that they have been hindered and delayed in the collection of the same by adverse litigation in the state of Maryland and in the state of New York and in other states. And he charges that it is represented by said trustees that their right to collect the debts due the company by subscribers on said assessments, has been called in question in some of the suits, and the validity of said deed of trust has been disputed.

And your orator further charges that in some of said suits said trustees have been enjoined from proceeding to collect the debts due said company, and said trustees have thus far been able, as they represent, to collect very little, if any, of said debts, by reason of the difficulties interposed by said litigation.

And so your orator charges that the debts due said company and which ought to be applied to the payment of its creditors, are either now lost in a great part, or are in danger of being lost, and are not now available for the payment of said creditors.

And your orator further charges that even if said trustees can surmount the embarrassments and difficulties which they allege have prevented them hitherto from realizing said assets, the amount

which can be realized from all the property which passed to said trustees, and which could under any circumstances be realized by them, would be entirely inadequate to pay the just debts of said company.

For your orator is advised and respectfully submits, that by the true construction of said deed of trust, no part of the eighty per cent. of subscriptions to said capital stock, which had not been called for by said company from its subscribers, passed to said trustees, nor any power to sue for or collect said subscription so uncalled for, but that the relations between said company and its subscribers, and their legal rights and obligations as to said uncalled for part of said subsciptions, remained unaffected by said deed of trust.

And your orator is advised and respectfully submits, that under said deed of trust, assuming the same to be valid, said trustees acquired no right to sue a subscriber for his subscription to said stock, except to the extent that said company could sue such subscriber, and your orator is advised and respectfully submits, that said company could not sue one of its subscribers for his subscription, unless and until said company has first made an assessment or call upon such subscriber therefor. And so your orator is advised and respectfully submits, that allowing said deed to have full legal validity everywhere, and allowing said trustees to proceed without impediment to collect all debts due the company collectable by them, it is manifest that the provisions of said deed of trust are wholly inadequate to provide for the payment of the debts of said company, many of whose creditors your orator charges are in very needy circumstances, and all of whom have waited nearly five years for the satisfaction of their just demands.

And your orator further charges that even if said company were now to levy an additional assessment upon its stockholders, it is doubtful whether the right to sue for and collect such assessment would rest in said trustees under said deed, and in attempting to collect the same, said trustees would meet with this additional emba-rassment, besides those which they allege have attended their efforts to collect the calls already made and unpaid at the date of said deed, and which were intended to be conveyed to them by said deed.

And your orator further charges that if it be held that any new call were to be made by said company would not pass to said trustees, and they would not for any reason be entitled to collect the amount thereof, but that the amount of such calls would be due to the said company by the stockholders, it would lead to ruinous and disastrous consequences, inasmuch as the creditors of said company would endeavor to reach the amounts due to said company under such additional call from its solvent stockholders, and much there-

of would be lost in the expenses of litigation, and an equitable and just division thereof among the creditors would be wholly defeated, as your orator further charges, that a large part of the debts of said company are too small to justify the holders of them, who are poor men, in entering upon such a race of diligence.

And your orator further charges that it will be necessary to resort to the residue of said subscriptions in order to provide the requisite means to pay the debts of said company. And he is advised and respectfully submits, that said subscriptions, so far as the same are unpaid, constitute a trust fund for the payment of the debts of said company, and that the same can and ought to be collected and so applied.

And he further represents that inasmuch as the stockholders reside within different jurisdictions, it is impossible for the creditors to make them all defendants in any one court, and compel an equitable contribution from them to raise a fund sufficient to pay the debts of said company.

And he is advised that to proceed against the stockholders who are within the jurisdiction of each court, would increase litigation and would lead to other injurious consequences.

For your orator is advised that should the creditors proceed against the stockholders within the jurisdiction of any one court, they would be entitled to compel said stockholders to contribute to the extent of their unpaid subscriptions, without reference to the contribution that should be made by other stockholders not within said jurisdiction, and would force those so compelled to contribute, to resort to stockholders elsewhere for contributions and indemnity, and thus greatly multiply litigation and expense.

And your orator is advised, and respectfully submits, that in view of the difficulties and embarrassments which are alleged by said trustees to have attended their efforts to collect so much of the debts of said company as was intended to be conveyed to them by said deed of trust, and in view of the further and additional difficulties that would attend any attempt on the part of the said trustees to collect any new call to be made by said company, and in view of the ruinous expense, loss and injustice that would attend an attempt on the part of said company to collect such new call as debts due to itself, and in view of the necessity there is that resort must be had to the subscribers to provide means for paying the debts of said company, and in view of the expense, multiplicity of litigation, and other difficulties that would attend the proceeding of the creditors against said stockholders directly in the different states and jurisdictions in which said stockholders reside, and in view of the unquestionable right of said creditors, in some form, to compel payment from said stockholders, the said creditors are entitled to the interposition of a court of equity for their relief.

And he is advised and respectfully submits that said creditors are entitled to have an account taken of the debts of said company, and of the assets now available for the payment of the same other than the unpaid subscriptions, and that they are entitled to have an ascertainment of the amount of said uncalled for and unpaid subscriptions which will be required to provide means for the payment of the debts of said company in full, and that in ascertaining the amount so required, a proper allowance should be made for probable losses by insolvency of stockholders and otherwise, and for the expenses of collecting the same, and of this proceeding, and to have a decree requiring said company to make a call or assessment upon its stockholders sufficient to provide said necessary amount, and to have the debts created by such call placed in the hands of some person or persons to be appointod by this court, with adequate authority and power to sue for, collect and receive the same, and bring the same into this court to await its further order.

And your orator further charges that before the questions relating to the powers, rights and obligations of said trustees under said deed of trust can be finally decided there is imminent danger that a large part of the said subscriptions to the stock of said company may be lost by the insolvency of the subscribers and other causes.

And he is further advised that he and the other creditors are entitled to have said deed of trust pronounced upon and construed by this court, and to have the powers and duties of the trustees thereunder, and the rights of the creditors ascertained and defined.

And he is advised that, as said company is a Virginia corporation, and as said deed of trust conveys nothing but personal property, whatever force and effect may be given to the same by the law of this state will be respected and enforced in the courts of other states when said deed may be drawn in question, so far as the law of Virginia with reference to said deed may not conflict with the positive law of such other states.

And so your orator is advised and submits that he and the other creditors of said company are entitled to have the judgment of this court as to the validity and scope of said deed of trust under the laws of Virginia.

And your orator further charges that there has not been recently any election of officers by said company, but he is advised that, under its charter and the laws of Virginia, the officers of said company last elected remain such officers until the election and qualification of their successors, and are competent to exercise the power of such officers.

And he is further advised and submits that under the laws of Virginia the corporate franchises of said company and its existence

as a corporation continue in full force and effect until the affairs of said company shall have been fully settled and its debts paid.

And your orator charges that William H. Perot, of Baltimore, is the president of said company, and that the Board of Directors thereof are William Devries and D. J. Foley, of Baltimore; M. G. Harman, of Staunton, Virginia; Jos. R. Anderson, of Richmond; F. P. Zimmerman, of Augusta, Georgia; J. Carter Mowbray, of Washington, D. C.; Wm. H. Webb, of New York city, and Lorenzo Norvell, whose residence is unknown to your orator.

The principal office of said corporation is in the city of Richmond in the State of Virginia.

Forasmuch, therefore, as your orator and the other creditors of said company are without remedy in the premises, save in a court of equity, and to the end that an account may be taken of the debts due by said company, and that said trustees may state what amount, if any, of money or other property they have received for the payment of the debts of said company, and what payments they have made, and what debts and other property or money belonging to said company they now hold under said deed of trust, and that an account may be taken of such available assets of said company as may now be held by said trustees, and of the subscriptions yet unpaid and uncalled for, and of the value thereof, and that the amount necessary to be assessed upon the solvent subscribers of said company in order to provide means for the payment of its debts and of the expenses of collecting and administering the same may be ascertained, and that said Board of Directors of said company may be decreed to levy an assessment or to make a call upon the subscribers for payment of a sufficient amount of their unpaid and uncalled for subscriptions to pay the said debts and all necessary expenses, in case said Board of Directors shall otherwise be unwilling or fail to take such account and to make such call voluntarily.

And that the validity, effect and scope of said deed of trust may be ascertained and pronounced upon by this court, and the powers, duties and rights of the trustees, and of the creditors of said company thereunder, may be ascertained and interpreted, and the execution of said trust, if the same be held valid, be decreed, and that in the meantime a receiver or receivers *ad litem* may be appointed by this court, with power and authority to receive, sue for, and collect and reduce to money all debts, choses in action, and claims now in the hands of said trustees, and to take possession of and sell all property vendible in its nature held by said trustees, and with full power and authority to sue for, receive and collect any moneys that may become due from any stockholders of said company upon any new or additional calls that may be made by said company upon said stockholders, and that said trustees and

said company may be required to execute and deliver to said receiver or receivers, or trustees *ad litem*, any and all assignments, deeds and conveyances as may be necessary to vest such receiver or receivers, or trustees *ad litem*, with legal power and authority to sue for, demand and receive such debts or other property of said company, or that in case the same be necessary, that such receiver or receivers or trustees *ad litem* may be authorized to use the names of said trustees or of said company in prosecuting any suits or actions that may be necessary to compel payment of any debts due said trustees or said company, or to reduce its property to possession, and that such receiver or receivers or trustees *ad litem* may bring into this court to await its final order any and all moneys received or collected by him or them under said decree or order, and that your orator and the other creditors of said company may have such other or further relief as the equity of the case may require and to your Honor may seem meet. May it please your Honor to grant unto your orators the writ of subpœna to the said The National Express and Transportation Company, and to the officers and directors thereof above named, and to the said John Blair Hoge, C. Oliver O'Donnell and John J. Kelly to be directed, commanding them to be and appear in this court, and answer fully in the premises, and show cause, if any they have, why a decree should not be passed as prayed, and your orator have the relief he seeks.

And your orator, as in duty bound, will ever, &c.

MARSHALL & FISHER.
JOHN HOWARD, p. q.

COMPLAINANT'S EXHIBIT, W. W. G., No. 1.

In the Superior Court of Baltimore city, May term, 1870:

W. W. Glenn
vs.
The National Express and Transportation Company.

29th April, 1869, nar., 3 prom. notes, 3 protests, acct. and affit. fd.

Sumd. by service on Wm. H. Perot, president.

8th June, 1869, judgment by default for want of plea and affidavit.

24th June, 1870, judgment by default extended for $42,501.31 damages assessed by the court, with int. from 24th June, 1870, and costs.

Order of court fd.

Plaintiff's costs, $8.65; defendant's costs, $5.30.

STATE OF MARYLAND—*Baltimore City, set:*

I hereby certify that the aforegoing is a true short copy of the judgment in the above entitled cause, taken from the record of the proceedings of the superior court of Baltimore city. And I hereby further certify, that said record contains no proceeding or entry to show that the judgment aforesaid has been satisfied either in whole or in part.

In testimony whereof, I hereto set my hand and affix the seal of the said court, this 23d day of October, A. D. 1871.

[L. S.] GEORGE ROBINSON,
Clerk of the superior court of Baltimore city.

COMPLAINANT'S EXHIBIT, W. W. G., No. 2.

This deed, made the 20th day of September, A. D. 1866, between the "National Express and Transportation Company," a body politic and corporate under the laws of the state of Virginia, of the first part, and John Blair Hoge, John J. Kelly and C. Oliver O'Donnell, of the second part, witnesseth, that in consideration of the trusts hereinafter declared, and of one dollar paid to the said party of the first part by the said parties of the second part, the party of the first doth hereby grant, bargain, sell, convey, assign, and set over unto the said parties of the second part all the estate, property, rights and credits of the said party of the first part, of every kind and wherever situated in or out of the state of Virginia, including leases, horses, wagons, carts, harness, office furniture, safes, chests, fixtures, and other effects and moneys payable to the company, whether on calls or assessments on stock of the company, or on notes, bills, accounts, or otherwise, which property and moneys are enumerated and set forth in a schedule to be marked A, and annexed hereto, as soon as can be conveniently done, but the omission of any property, money or other thing from such schedule is not to prevent the same from being hereby granted or assigned. But this deed is made on the following trusts, that is to say:

First. That the said parties of the second part, hereinafter called the trustees, shall permit the said party of the first part to remain in the possession and use of all the property herein granted or assigned, except debts, claims and moneys payable, until the first day of November, A. D. 1866, and thereafter, until the trustees shall be requested by one or more of the creditors hereby secured, and whose debt or debts shall then be due, to take possession of such property; but the trustee shall take possession thereof at any time

after the date of this deed, if requested so to do by the Board of Directors of said party of the first part.

Secondly. That the trustees shall proceed without unnecessary delay to collect all the debts, claims and moneys payable which are hereby granted or assigned.

Thirdly. That as soon as the trustees shall be authorized under the foregoing provisions to take possession of the other property hereby granted or assigned, they shall take possession thereof and sell the same at public or private sale in such manner as they shall deem best, for ready money or on reasonable credit with good security.

Fourthly. That the trustees shall have authority to employ, at the expense of this trust, such agents, clerks, counsel, attorneys and servants as they shall deem necessary for the proper execution of the trusts of this deed, and to incur such other reasonable expenses as they shall deem necessary for that purpose.

Fifthly. That out of the moneys which shall arise or come to the possession of the trustees under or by virtue of this deed, they shall pay first the expenses of this trust, including the cost of preparing, stamping and recording this deed, and a commission of five (5) per cent. to the trustees on the money received, and next they shall pay all debts now due, or which shall become due from the said party of the first part, to its officers and employees for their services as such on or before the first day of November next or such previous time as the trustees are required to take possession of all the property hereby granted as aforesaid.

Sixthly. Out of the remainder of such moneys the trustees shall next pay in rateable proportion the two debts which it now owes, one to the Baltimore and Ohio Railroad Company and the other to the Bank of Commerce (of Baltimore), the same being the principal debts due by the said party of the first part, but the precise amounts of which cannot now be exactly stated.

Seventhly. That out of the remainder of such moneys the trustees shall pay all debts of the said party of the first part, for which any officer or director of the company is now liable as indorser or surety for the said party of the first part.

Eighthly. That out of the remainder of such moneys the trustees shall pay in rateable proportion the balance of all debts for which the said party of the first part shall become liable to any railroad companies for transportation of express matter after the date of this deed and on or before the first day of November next, after first applying to said debts the net proceeds according to the said party of the first part from such transportation, such net proceeds being what may remain of the compensation received for such transportation after paying the current expenses of the business, and notwithstanding anything hereinbefore contained, the said

party of the first part shall have a right to receive all tolls and compensations accruing for the transportation of express matter not yet delivered to consignees, or not yet transported, although under existing contracts.

Ninthly. That out of the remainder of the moneys which shall arise and come to the possession of the trustees under this deed, they shall pay (so far as such remainder shall be sufficient) all other debts and liabilities of the said party of the first part now existing in rateable proportion, so far as such debts and liabilities shall be made known to the trustees, within ten months after the date of this deed, or before they shall have distributed any money under this ninth clause.

Tenthly. That any moneys remaining in the hands of the trustees herein named, after satisfying the foregoing trusts, shall be paid to said party of the first part.

In testimony whereof, Joseph E. Johnston, President of the said National Express and Transportation Company, by virtue of authority in him vested by an order and resolution of the Board of Directors of said Company, hath affixed the common seal of said corporation to this deed, as the act and deed of said corporation; and, as evidence thereof, he also subscribes his name hereto the day and year above written.

[L. S.] J. E. JOHNSTON,
President, &c.

CITY OF RICHMOND—*State of Virginia:*

I, Roger J. Page, a notary public for the corporation aforesaid, in the State of Virginia, do certify that Joseph E. Johnston, President of the National Express and Transportation Company, whose name is signed to the writing above, bearing date September 20th, 1866, has acknowledged the same before me in my corporation aforesaid.

Given under my hand this 20th day of September, A. D. 1866.

Signed, ROGER J. PAGE, N. P.
Signed, J. E. JOHNSTON.

City of Richmond, to-wit:

In the office of the court of hustings of the said city the 21st day of September, 1866—

This deed was presented, and with the certificate annexed,

court. For your complainant is advised, and insists, that the trusts of said deed, whatever they may be, will not be permitted to fail because either of the absence, non-residence, recusancy, death, or other default or disability of said trustees, or of any of them, and that if necessary or proper for the protection and realization of the rights of the creditors of said corporation, all of the property and estate of every kind of the said corporation, which has long ceased to exercise its franchises or to do business, will, as a trust fund for the payment of the corporate debts, be directed to be conveyed (by a commissioner appointed for that purpose) either to a new trustee *eo nomine*, or to such receiver or receivers as the court may appoint, who shall be clothed with full powers to collect all the assets of the corporation, and be required to bring the proceeds into court for the satisfaction of the corporate creditors.

And your complainant is further advised and insists, that if upon due requirement thereto the said company should further fail to make such assessment upon its stockholders as may be necessary to pay its corporate debts, it will be within the rightful jurisdiction and province of this honorable court, in furtherance of justice, to order and require such assessment to be made under its direction by one of its master commissioners, or otherwise, and the said assessment to be collected by due legal process and applied to the payment of said debts.

Your complainant is advised that such a course is within the legitimate jurisdiction and established practice of a court of equity, and certainly the circumstances of this case call strongly for the vigorous exercise of all necessary powers of remedial relief.

Said corporation, national in name, but southern in its origin and affinities, set out on its career in the fall of 1865 with the most brilliant and ambitious prospects. By many, perhaps by most, indeed, who subscribed for its stock, it was thought to be a great money-making scheme, and it did not hesitate to incur a large indebtedness in the establishment and carrying on of its business. This, in great part, it was enabled to do by the warm sympathy, good wishes and hearty co-operation of many of the worthiest, most intelligent and patriotic citizens and institutions of the land, from whom it received encouragement and credit in a liberal manner. And such, in fact, was the reality and the promising outlook of its large and prosperous business that, as appears by the said original bill, only a small part of the subscriptions to the capital stock was called for or paid in. But by the most unbusinesslike and culpable negligence and mismanagement, the great and useful enterprise was suffered to fall through in November, 1866, and its numerous friends and creditors—many of them creditors because friends were left in the lurch, and have been permitted to remain so ever since; nay, while the company has, as above stated, itself

done nothing towards the payment of its debts, but the execution of the deed of trust aforesaid, the said trustees in said deed have wholly failed and refused to execute the provisions of said deed, though often requested thereto by the said W. W. Glenn and other creditors of the said company.

Among the claims against the said company it is believed that there are none more meretorious than that of the said Glenn, which is for money paid as endorser for said company and for money lent, &c. Your complainant herewith files a complete transcript of the record in the case of the said Glenn against the said company in the superior court of Baltimore city, in the state of Maryland, in which the said judgment mentioned in the said original bill was obtained, which transcript is marked "R," and is prayed to be taken as part of this amended and supplemental bill. The said judgment, as will be seen by an inspection of said record, was founded upon three several negotiable notes, made by the said company, and endorsed and paid by the said Glenn, after due protest of the same, and an account for money lent, &c., which said notes and account are duly set forth in said transcript, and proof of which said original causes of action will be furnished if required.

In consideration whereof your complainant prays that the said National Express and Transportation Company and the other persons mentioned as parties defendant in said original bill (with the exception of the said M. G. Harman, who is dead,) namely, William H. Perot, of Baltimore, Maryland, president of said company; William Devries and D. J. Foley, of Baltimore, Maryland; Joseph R. Anderson, of Richmond, Virginia; F. P. Zimmerman, of Augusta, Georgia; J. Carter Mowbray, of Washington, D. C.; William H. Webb, of New York, and Lorenzo Norvell, of Lynchburg, Virginia, who are directors of said company. M. B. Poiteaux, of Richmond, Virginia, cashier and treasurer of said company, and John Blair Hoge, of West Virginia, and John J. Kelly, of New York, surviving trustees in said deed of trust in the proceedings mentioned, and, if deemed necessary or proper, John W. Wright, sheriff of the city of Richmond, and as such administrator of said C. Oliver O'Donnell, dec'd, late one of the trustees in said deed, may be made parties defendant to this amended and supplemental bill, the said non-residents of the state of Virginia, by an order of publication duly made, and may be required to answer the same and said original bill; that the said claims of the said W. W. Glenn and other creditors of said company may be established and decreed to be paid; that all of the prayers in said original bill contained may be granted, as if the same were herein repeated; that the said trustees, John Blair Hoge and J. J. Kelly, may be required to deliver up and surrender to this court all of the books of said company of every kind and description that came

into their hands or into the hands of either of them; that the said trustees be removed from office, and if necessary another trustee, or other trustees, may be substituted in their place and stead, and the property and estate embraced in said deed of trust be conveyed to such substituted trustee or trustees, or to such receiver or receivers as may be appointed by the court; that all proper process may issue; that all proper orders and decrees may be made, and that all such other, further and general relief may be granted to your complainant and to the other creditors of the said National Express and Transportation Company as the nature of the case may require and to equity may seem meet, and he will ever pray, &c.

JOHN HOWARD, p. q.

EXHIBIT "R," WITH AMENDED AND SUPPLEMENTAL BILL.

STATE OF MARYLAND—*City of Baltimore—set:*

At a session of the superior court of Baltimore city, in the eighth judicial circuit of the state of Maryland, begun and held at the court-house, in the city of Baltimore, in and for the city aforesaid, on the second Monday of May (being the ninth day of the same month), in the year of our Lord one thousand eight hundred and seventy.

Present: The Honorable George W. Dobbin, associate judge of the supreme bench of Baltimore city, assigned to and presiding in the superior court of Baltimore city.

AUGUSTUS ALBERT, Esq., Sheriff.
GEORGE ROBINSON, Clerk.

Among other were the following proceedings, to-wit:

William W. Glenn, Plaintiff,

vs.

The National Express and Transportation Company, Defendant.

Be it remembered, that heretofore, to-wit: On the twenty-ninth day of April, in the year of our Lord one thousand eight hundred and sixty-nine, the said *William W. Glenn*, by Charles Marshall and William A. Fisher, Esqrs., his attorneys, prosecuted and sued forth out of the court here the writ of the state of Maryland of summons, directed to the sheriff of Baltimore city in the words and of the tenor following, to-wit:

WRIT OF SUMMONS.

[L. S.] *Baltimore city, to-wit:*

STATE OF MARYLAND: *To the Sheriff of Baltimore city—Greeting:*

You are hereby commanded to summon The National Express and Transportation Company, a body politic and corporate of the state of Virginia, and late holding and exercising franchise in the state of Maryland, of Baltimore city, to appear before the superior court of Baltimore city, to be held at the court-house, in the same city, on the second Monday of May next, to answer an action at the suit of William W. Glenn, and have you then and there this writ.

Witness the Hon'able T. Parkin Scott, chief judge of the supreme bench of Baltimore city, the 11th day of January, 1869.

Issued 29th day of April, 1869.

GEO. ROBINSON, Clerk.

And the said plaintiff, at the same time of bringing his action aforesaid, declared against the said defendant, and at the same time also filed therewith an affidavit with three promissory notes, three protests and account, which declaration, promissory notes, protests, accounts, and affidavits, are in the words, figures, and tenor following, to-wit:

DECLARATION.

In the Superior Court of Baltimore City.

Baltimore city, to-wit:

William W. Glenn, by Marshall and Fisher, his attorneys, sues the National Express and Transportation Company, late a body politic and corporate of the state of Virginia, and late holding and exercising franchises in the state of Maryland:

1. For money payable by the defendant to the plaintiff for goods bargained and sold by the plaintiff to the defendant.
2. Work done and materials provided by the plaintiff for the defendant at its request.
3. Money lent by the plaintiff to the defendant.
4. Money paid by the plaintiff for the defendant at its request.
5. Money received by the defendant for the use of plaintiff.
6. Money found to be due from the defendant to the plaintiff on accounts stated between them.

7. That the defendant on the twenty-eighth day of April, 1866, by its promissory note, now over-due, promised to pay to the plaintiff, or order, $5,000, at the Bank of Commerce, Baltimore, Maryland, four months after date, but did not pay the same.

8. That the defendant by its other promissory note, now over-due, on the ninth day of August, 1866, promised to pay to the order of Benjamin F. Ficklin $10,660.00 without offset, at the Bank of Commerce, in Baltimore, on or before the 6th day of April, 1867, and the said Benjamin F. Ficklin endorsed the same to the plaintiff, but the defendant did not pay the same.

9. That the defendant by its other promissory note now overdue, on the 9th day of August, 1866, promised to pay to the order of Benjamin F. Ficklin $10,843.34, without offset, at the Bank of Commerce in Baltimore, on or before the sixth day of August 1857; and the said Benjamin F. Ficklin endorsed the same to the plaintiff, but the defendant did not pay the same.

And the plaintiff claims $50,000.

MARSHALL & FISHER,

Attorneys for plaintiff.

PROMISSORY NOTES AND PROTESTS.

Richmond, Va., April 28th, 1866.

$50,000.

[United States $5 internal revenue stamp.]

Four months after date we promise to pay to W. W. Glenn or order, without offset, five thousand dollars.

Negotiable and payable at the Bank of Commerce, Baltimore, Md.

Value received.

NATIONAL EXPRESS AND
TRANSPORTATION COMPANY,

By J. E. JOHNSTON, Prest.

Endorsed:

W. W. GLENN.
J. V. H. ALLEN, Treasurer.
H. R. GLENN.
W. W. GLENN.

Baltimore, August 9, 1866.

$10,843.34.

[U. S. S. Int. Rev. conveyance, five dollars and sixty cents.]

On or before the 6th day of August, 1867, the National Express and Transportation Company will pay at the Bank of Commerce in Baltimore to the order of Benjamin F. Ficklin, ten thousand eight hundred and forty-three dollars and 34 cents without offset, for value received.

NATIONAL EXPRESS AND
TRANSPORTATION COMPANY,
By M. G. HARMAN, Vice-President.

Endorsed:

B. F. FICKLIN.
W. W. GLENN.

UNITED STATES OF AMERICA—*State of Maryland, to wit:*

On this day, the ninth of August, in the year of our Lord eighteen hundred and sixty-seven, at the request of Bank of Commerce, Baltimore, Md., bearer of the original promissory note, whereof a true copy is above written, I, Joseph T. Atkinson, notary public, by letters patent, under the great seal of the State of Maryland, commissioned and duly qualified, residing in the city of Baltimore, in the State aforesaid, presented the said promissory note at the Bank of Commerce and demanded payment. Received for answer, "No funds."

[Comptroller's seal.]

Wherefore, I, the said notary, at the request aforesaid, have protested, and by these presents do solemnly protest, as well against the maker and endorser of the said promissory note, as all others whom it may concern, for exchange, re-exchange, and all costs, charges, damages, and interests suffered and to be suffered for want of payment of the said promissory note.

Thus done and protested, at the city of Baltimore aforesaid; and on the same day I addressed written notices to the endorsers of the said promissory note, informing them that it had not been paid, payment therefor having been demanded and refused, and that they would be held responsible for the payment thereof.

Sent notices to M. G. Harman, V. P. Nat. Ex. & Trans. Co., the maker, and B. F. Ficklin, the first endorser, by depositing them in Baltimore post-office, directed to them at Staunton, Va.

Left notices for W. W. Glenn, the last endorser, and Thomas G. Pratt, receiver, Nat. Ex. & Trans. Co., at their places of business in this city.

In testimony whereof, I have hereunto set my hand and affixed my seal notarial the day and year aforesaid.

[L. S.] JOSEPH T. ATKINSON,
Notary Public.

Protest,	$2 00
U. S. tax,	25
Postage,	6
	$2 31

[United States 25c. Int. Rev. Stamp—Certificate.]

Baltimore, Aug. 9, 1866.

$10,660.

On or before the 6th day of April, 1867, the National Express and Transportation Company will pay at the Bank of Commerce, in Baltimore, to the order of Benjamin F. Ficklin, ten thousand six hundred and sixty dollars, without offset, for value received.

NATIONAL EXPRESS AND
TRANSPORTATION COMPANY,
By M. G. HARMAN, Vice-President.

Endorsed:

B. F. FICKLIN,
W. W. GLENN.

[One $5, one 25c., two 5c. United States Int. Rev. Stamps.]

April 9th, 1867.

Protested for non-payment.

L. WARREN, N. P.

PROTEST.

Baltimore, August 9th, 1866.

$10,660.

On or before the 6th day of April, 1867, the National

Express and Transportation Company will pay at the Bank of Commerce, in Baltimore, to the order of Benjamin F. Ficklin, ten thousand six hundred and sixty dollars, without offset, for value received.

NATIONAL EXPRESS AND
TRANSPORTATION COMPANY,

By M. G. HARMAN, Vice-President.

Endorsed:

B. F. FICKLIN,
W. W. GLENN.

[One $5, one 25c., two 5c. United States Int. Rev. Stamps.]

UNITED STATES OF AMERICA—*State of Maryland, to-wit:*

On this day, the 9th of April, in the year of our Lord eighteen hundred and sixty-seven, at the request of the Bank of Commerce of Baltimore, bearer of the original promissory note, whereof a true copy is above written, I, Leander Warren, notary public by letters patent, under the great seal of the state of Maryland, commissioned and duly qualified, residing in the city of Baltimore, in the state aforesaid, presented the said promissory note at the Bank of Commerce in Baltimore, and demanded payment, was answered, "No funds."

[Comptroller's seal.]

Wherefore, I, the said notary, at the request aforesaid, have protested and by these presents do solemnly protest, as well against the makers and endorsers of the said promissory note as all others whom it may concern, for exchange, re-exchange, and all costs, charges, damages and interests suffered and to be suffered, *and to be suffered*, for want of payment of the said promissory note.

Thus done and protested, at the city of Baltimore aforesaid; and on the same day I addressed written notices to the endorsers of said promissory note, informing them that it had not been paid, payment therefor having been demanded and refused, and that they would be held responsible for the payment thereof. And left notices for the Nat. Ex. and Transportation Company with Thomas G. Pratt, Esq., receiver, and for the last endorser at his place of business. Mailed notices for the first endorser directed to Benj. F. Ficklin, Esq., Richmond, Va., and also mailed notice for M. G. Harman, Esq., Vice-President, directed to him at Staunton, Va., the same day.

In testimony whereof, I have hereunto set my hand an affixed my seal notarial the day and year aforesaid.

[L. S.] LEANDER WARREN,
Notary Public.

Protest,	$2 00
U. S. tax,	25
Postage,	6
	$2 31

[One 25c. U. S. Int. Rev. Stamp.]

Baltimore, Aug. 9th, 1856.

$10,843.34.

On or before the 6th day of August, 1867 the National, Express and Transportation Company will pay at the Bank of Commerce in Baltimore to the order of Benjamin F. Ficklin, ten thousand eight hundred and forty-three dollars and 34 cents without off-set, for value received.

NATIONAL EXPRESS AND
TRANSPORTATION COMPANY,

By M. G. HARMAN, Vice-President.

Endorsed:

B. F. FICKLEN,
W. W. GLENN.

[One $5; one 25c.; two 5c.; five 2c. United States Int. Rev. Stamps.]

Baltimore, August 6th, 1867.

Protested for non-payment.

JOSEPH T. ATKINSON, N. P.

Baltimore, August 6th, 1867.

Prostested for non-payment.

JOS. T. ATKINSON, N. P.

Baltimore, Aug. 9th, 1866.

$10,843.34.

On or before the 6th day of August, 1867, the National Express and Transportation Company will pay at the Bank of Com-

merce in Baltimore to the order of Benjamin F. Ficklin, ten thousand eight hundred and forty-three dollars and thirty-four cents, without offset, for value received.

NATIONAL EXPRESS AND
TRANSPORTATION COMPANY,

By M. G. HARMAN, Vice-President.

Endorsed:

B. F. FICKLIN,
W. W. GLENN.

[1 U. S. Stamp for 5 dollars; 1, 25 cents; 2, 5 cents; 5, 2 cents.]

United States of America,
State of Maryland, to-wit:

On this day, the sixth of August, in the year of our Lord, eighteen hundred and sixty-seven, at the request of the cashier of the Bank of Commerce, bearer of the original promissory note, whereof a true copy is above written, I, Joseph T. Atkinson, notary public, by letters patent, under the great seal of the state of Maryland, commissiond and duly qualified, residing in the city of Baltimore, in the state aforesaid, presented the said promissory note at the Bank of Commerce in this city and demanded payment. Received for answer: "No funds."

[Comptroller's seal.]

Wherefore, I, the said notary, at the request aforesaid, have protested, and by these presents do solemnly protest, as well against the maker and endorsers of the said promissory note, as all others whom it may concern, for exchange, re-exchange, and all costs charges damages and interests suffered, and to be suffered for want of payment of the said promissory note.

Thus done and protested, at the city of Baltimore aforesaid. And on the same day I addressed written notices to the endorsers of the said promissory note, informing them that it had not been paid, payment therefor having been demanded and refused, and that they would be held responsible for the payment thereof. Sent notice to National Express and Transportation Company by M. G. Harman, Vice-Pres't, maker, and F. Ficklin, first endorser, by depositing the same in the Baltimore post-office, directed to them respectively at Staunton, Va. Left notice for W. W. Glenn, last endorser, at his place of business in this city.

In testimony whereof I have hereunto affixed my seal notarial, the day and year aforesaid.

[L. S.] JOSEPH T. ATKINSON,
Notary Public.

Protest,	$2 00
U. S. tax,	25
Postage,	6
	$2 31

[United States 25c. Int. Rev. stamp.]

ACCOUNT.

National Express and Transportation Company, Dr.,

To W. W. Glenn.

1866.			
June 5	—To paid company as loan,		$5,000 00
	To paid New York Daily News, advertising,		25 20
11	—To paid company as loan,		5,000 00
15	—To paid company as loan,		6,500 00
			$16,525 20
	To interest on 1st payment, $5,000, to 23d Sept., 1867, 1 yr. 3 m. 18 d.,	$390 00	
	To interest on 2d payment, $5,000, to 23d Sept., 1867, 1 yr. 3 m. 12 d.,	385 00	
	To interest on 3d payment, $6,500, to 23d Sept., 1867, 1 yr. 3 m. 8 d.,	496 17	
			1,271 17
			$17,796 37
	Amt. due Sept. 23d, 1867,		
1867.			
Sept. 23	—By rec'd of G. W. Phillips, U. S. Marshal, proceeds sales in Glenn *vs.* N. E. & Tr. Co., Washington attachment,	$3,567 12	
	Less am't paid and retained for horse feed and service rendered by J. Carter Mow-		

	bray, att'y for National E. & Tr. Co.,	354 00	
		$3,213 12	
	By rec'd of company for advertising,	25 20	
			3,238 32
			$14,558 05
	To interest from Sept. 23d, 1867, to Oct. 15, 1867, 22d.,		53 38
			$14,611 43
Oct. 15	—By rec'd of Thos. G. Pratt, receiver, this amount audited account of Glenn *vs.* N. E. & Tr. Co., to claim of W. W. Glenn,	$5,390 77	
	Less sheriff's costs,	204 27	
			5,186 50
	Amount due Oct. 15th, 1867,		$9,424 93
	To interest to April 26th, 1869, 1 yr., 6m., 11 d.,		865 52
	Amount forward,		$10,290 45
	Amount bro't forward,		$10,290 45
1866.			
Aug. 31	—To paid note at Bank Commerce, J. E. Johnston, pres't, N. E. & Tr. Co. for W. W. Glenn, dated Richmond, Va., April 28th, at 4 mo., due Aug. 28–31,	$5,000 00	
	To interest to April 26–29, 2 yr., 7 m., 26 d.,	796 67	
			5,796 67
			$16,087 12
	To am't note of National Express and Transportation Co. by M. G. Harman, vice-president, for Benjamin F. Ficklin, and endorsed by W. W. Glenn, dated Balti-		

more, August 9, 1866, payable on or before April 6, '67, at Bank of Commerce, in Balt'o, and protested for non-payment,	$10,660 00	
To paid protestation note,	2 31	
Interest on am't of note, $10,660, from April 9th, 1867, to April 26th, 1869, 2 yrs., 17 ds.,	1,309 40	
		11,971 71
		$28,058 83
To am't of note of National Express and Trans. Co., by M. G. Harman, vice-president, for Benj. F. Ficklen, and endorsed by W. W. Glenn, dated Baltimore, Aug. 9th, '66, payable on or before Aug. 6, '67, at Bank of Commerce, in Baltimore, and protested for non-payment,	10,843 34	
To paid protest note,	4 62	
To interest on am't of note, $10,843.34, from Aug. 9, '67, to April 26th, 1869, 1 yr., 8 mo., 17 d.,	1,115 05	
		11,963 01
		$40,021 84

AFFIDAVIT.

STATE OF MARYLAND—*City of Baltimore, to-wit:*

I hereby certify that on this twenty-sixth day of April, 1869, before me, the subscriber, a justice of the peace of said state, in and for the city aforesaid, personally appeared William W. Glenn, and made oath on the Holy Evangely of Almighty God, that there is justly due and owing by the National Express and Transportation Company, the defendant within named, to him, the plaintiff in this cause, on the annexed account and notes, the sum of forty thousand and twenty-one dollars and eighty-four cents (including

interest to this 26th day of April, 1869) over and above all discounts, to the best of his knowledge and belief.

GEO. McCAFFRAY, J. P.

A copy of which said declaration was made and sent with the said writ to the sheriff of the city aforesaid thereon endorsed: So served on the defendant with the writ.

At which mentioned second Monday of May, in the year aforesaid, being the day of the return of the foregoing writ, comes into court here the said plaintiff by his attorneys aforesaid, and the sheriff of Baltimore city aforesaid, to-wit: John W. Davis, gentleman, to whom the foregoing writ was in form aforesaid directed, makes return thereof to the court here thus endorsed, to-wit:

"Summoned by service on William H. Perot, President. Copy left.

"JOHN W. DAVIS, Sheriff."

And the said defendant being called, appears in court here by John Stewart and J. Blair Hoge, Esqrs., its attorneys.

And thereupon, in pursuance of the statute in such case made and provided, further day is given to the said defendant at any time before the second Monday in June next to file a plea, etc., or judgment by default will be rendered against it.

The same day is given to the said plaintiff then and there, &c.

At which said second Monday of June, in the year aforesaid, came into court here the said plaintiff by his attorneys aforesaid.

And the said defendant comes not, but makes default.

Therefore it is considered by the court here that the said plaintiff recover against the said defendant.

But because it is unknown to the court here what damages the said plaintiff hath sustained, a day is given to the said parties before the court here, on the second Monday in September next, to inquire of and assess the damages which the said plaintiff hath sustained by reason of the premises.

At which said second Monday of September, in the year aforesaid, come into court here the said plaintiff by his attorneys aforesaid, but the said defendant comes not.

And because it is still unknown to the court here what damages the said plaintiff hath sustained, a further day is given to the said parties, before the court here on the second Monday of January next, to inquire of and assess the damages which the said plaintiff hath sustained by reason of the premises.

At which said second Monday of January, in the year of our Lord eighteen hundred and seventy, come again into court here the said plaintiff by his attorneys aforesaid, but the defendant comes not.

And because it is still unknown to the court here what damages the said plaintiff hath sustained, a further day is given to the said parties, before the court here on the second Monday in May next, to inquire of and assess the damages which the said plaintiff hath sustained by reason of the premises.

And now at this day—to-wit: the said second Monday of May, in the year last aforesaid, come again into court here the said plaintiff by his attorneys aforesaid.

But the defendant comes not.

Thereupon the said plaintiff, by his attorneys aforesaid, prays that the court assess his damages.

Whereupon the court here assess the damages of the said plaintiff on account of the premises and file in said cause the following order—to-wit:

ORDER OF COURT.

Filed 24th June, 1870.

W. W. Glenn
vs.
National Express and Transportation Co. } In the superior court of Baltimore city.

Judgment by default, June 8, 1869.

Upon legal and satisfactory proof of the correctness and amount of the claim for which the above suit was brought, being produced to the court, it is ordered, this twenty-fourth day of June, 1870, that the judgment, by default in this cause, be extended for $42,531 dollars 31 cents, damages assessed by the court.

GEORGE W. DOBBIN.

Therefore it is considered by the court here, that the said plaintiff recover against the said defendant as well the sum of forty-two thousand five hundred and thirty-one dollars and thirty-one cents, with interest from the twenty-fourth day of June, eighteen hundred and seventy, as the sum of eight dollars and sixty-five cents, for his cost and charges by him about his suit in this behalf laid out and expended. And the said defendant in mercy, &c. And the said plaintiff have thereof his execution, &c.

MEMORANDUM.

Final judgment was rendered in this case on the 24th June, 1870, for the plaintiff for $42,531.31, the damages assessed by the court, with interest from the 24th day of June, 1870, and costs.

Costs, $8.65.

STATE OF MARYLAND—*City of Baltimore, sct:*

I, Francis A. Prevost, clerk of the superior court of Baltimore city, do hereby certify that the aforegoing is a full, true, and entire transcript, taken from the record and preceedings of the said court in the therein entitled cause.

In testimony whereof, I hereunto set my hand and affix the seal of the superior court of Baltimore city aforesaid, on this first day of July, eighteen hundred and seventy-nine.

[Seal.] F. A. PREVOST, Clerk.

Maryland, sct:

I, George W. Dobbin, associate judge of the supreme bench of Baltimore city, assigned to and presiding in the superior court of Baltimore city, and the eighth judicial circuit of said state, do certify that the foregoing attestation of Francis A. Prevost, clerk of the said superior court of Baltimore city, is in due form and by the proper officer.

Given under my hand at the city of Baltimore, this first day of July, in the year one thousand eight hundred and seventy-nine.

GEORGE W. DOBBIN.

STATE OF MARYLAND—*City of Baltimore, sct:*

I, Francis A. Prevost, clerk of the superior court of Baltimore city, do hereby certify, that the Honorable George W. Dobbin, who has certified and signed the above attestation, was, at the time of so doing, presiding judge of the superior court of Baltimore city, in the eighth judicial circuit of the state of Maryland, duly commissioned and qualified; and that to all acts done by him in that capacity, full faith and credit are due and ought to be given, and that his signature thereto is genuine.

In testimony whereof, I hereunto subscribe my name, and affix

generally, and the same is in the words and figures following, to-wit:

ANSWER OF M. B. POITIAUX.

TO THE HON. E. H. FITZHUGH,
Judge of the Chancery Court of the City of Richmond:

The answer of M. B. Poitiaux, one of the defendants in a suit now before your honor, John W. Wright, sheriff of the city of Richmond, and as such administrator of W. W. Glenn, deceased, who sues, &c., &c., against The National Express and Transportation Company, W. H. Perot, M. B. Poitiaux, and other defendants.

For answer, your respondent would say, that he was the cashier of the first division of the said National Express and Transportation Company, his office being in the city of Richmond at the time of the conveyance executed by the said National Express Company to John J. Kelly, John Blair Hoge, and Columbus O. O'Donnell, trustees That he had been cashier as aforesaid for some four or five months previously; that the said first division comprised the states of Virginia, North Carolina, part of South Carolina, and Bristol, Tennessee; that the said National Express and Transportation Company is in debt to your respondent as of the 31st day of January, 1867, in the sum of three hundred dollars, for arrearages of his salary due and unpaid; and in the further sum of twenty-seven dollars and twenty-five cents, for monies advanced by him to pay sundry petty expenses in the office of the company, and which have never been refunded to him; that he has no books and papers in his possession belonging to the said Express and Transportation Company; that he does not know anything about the transactions of the said trustees, nor in whose possession the books and papers now are, or what has become of them; that he is not now, nor ever was, a stockholder in the said National Express and Transportation Company. And, having fully answered, prays to be hence dismissed, &c.

M. B. POITIAUX.

STATE OF VIRGINIA—*City of Richmond, to-wit:*

This day personally appeared before me, J. L. Williams, a notary public in and for the city aforesaid, M. B. Poitiaux, and made oath, in due form of law, that the statements made in the foregoing answer are true.

Given under my hand this 30th day of August, 1879.

J. L. WILLIAMS,
Notary Public.

And the subpœnas having been returned executed on Joseph R. Anderson, M. B. Poitiaux, The National Express and Transportation Company, and Lorenzo Norvell, and these defendants, except M. B. Poitiaux, failing to appear, it was ordered that unless they should appear at the then next rules and plead, answer or demur to the plaintiff's bills the same would be taken for confessed as to them and the matters thereof decreed accordingly. And the cause was continued for proof of the publication and posting of the order heretofore made in this cause, as to the non-resident defendants.

And at another day—to-wit: At rules held in the clerk's office of the said court on the last Monday in September, 1879:

The defendants, Joseph R. Anderson, The National Express and Transortation Company, and Lorenzo Norvell, still failing to appear, plead, answer, or demur to the plaintiff's original and amended and supplemental bills, the same were taken for confessed, and, on motion of the plaintiff by connsel, the cause was set for hearing as to them and M. B. Poitiaux. And the cause was continued for proof of publication and posting of the order heretofore made, as to the non-resident defendants.

And at another day—to-wit: In the clerk's office of the said court, on the 6th day of October, 1879:

Proof of the publication and posting of the order made herein on the 4th day of August, 1879, and also of the subpœna in chancery issued herein on the 5th day of August, 1879, having been filed, on motion of the plaintiff's counsel the cause was set for hearing as to all the defendants.

THE COMMONWEALTH OF VIRGINIA,

To the Sheriff of the City of Richmond, Greeting:

We command you that you summon the National Express and Transportation Company, Wm. H. Perot, William Devries, D. J. Foley, Joseph R. Anderson, F. P. Zimmerman, J. Carter Mowbray, William H. Webb, Lorenzo Norvell and M. B. Portiaux, John Blair Hoge and John J. Kelly, trustees, to appear at the Clerk's office of the Court of Chancery of the city of Richmond, at the rules to be held for the said Court on the first Monday in September, 1879, to answer original, amended and supplemental Bill in Chancery, exhibited against them in our said Court by John W. Wright, Sheriff of the City of Richmond, and as such administrator of W. W. Glenn, deceased, who sues on behalf of himself and such other creditors of the National Express and Transportation Company.

And have then there this writ. Witness, Benjamin H. Berry, Clerk of our said Court, at the Courthouse, the 5th day of August, 1879, and in the 103d year of our foundation.

BENJ. H. BERRY.

A copy—Teste,

BENJ. H. BERRY, Clerk.

In the Clerk's office of the Chancery Court of the city of Richmond, the 29th day of September, 1879, John A. Meanley this day made oath before me that he did, on the first day of September, 1879, that being the first day of the September term of the Hustings Court of said city, post a copy of the annexed order of publication at the front door of the new City Hall, in which said Hustings Court holds its sessions.

J. T. POINDEXTER, Dep. Clerk.

I hereby certify that the summons hereto attached of Berry, Clerk of Court, in suit of Wright vs. National Transportation Co. and others, was published in "The State" newspaper once a week for four weeks, the first insertion being on the 5th day of August, 1879.

JNO. HAMPDEN CHAMBERLAYNE, Ed'r, &c.
CHAMBERLAYNE & BEIRNE, Ed'rs and Prop'rs.

VIRGINIA—In the Clerk's office of the Chancery court of the city of Richmond, August 5, 1879, in vacation:

John W. Wright, Sheriff of the city of Richmond, and as such administrator of W. W. Glenn, deceased, who sues on behalf of himself and other creditors of the National Express and Transportation Company, Plaintiffs,

against

The National Express and Transportation Company, W. H. Perot, William Devries, D. J. Foley, Joseph R. Anderson, F. P. Zimmerman, J. Carter Mowbray, William H. Webb, Lorenzo Norvell, M. B. Portiaux, John Blair Hoge and John J. Kelly, trustees, Defendants.

In chancery, on original, amended and supplemental bill.

The object of this suit is to obtain a construction and enforcement of the deed of trust, in the proceedings mentioned, from the National Express and Transportation Company to the defendants, John Blair Hoge and John J. Kelly and another; to remove said Hoge and Kelly as trustees in said deed, and to subject all of the property, estate and rights of every kind of said Company to the

payment of the debts of the plaintiff and other creditors of said Company, and in furtherance thereof to appoint a receiver or receivers with due powers to collect and make available such property, estate and rights. And affidavit having been made and filed that the defendants, Wm. H. Perot, William Devries, D. J. Foley, F. P. Zimmerman, J. Carter Mowbray, William H. Webb, John Blair Hoge and John J. Kelly, are non-residents of the State of Virginia, it is ordered that they appear here within one month after due publication hereof, and do what is necessary to protect their interests herein.

A copy—Teste,

BENJ. H. BERRY, Clerk.

JOHN HOWARD, p. q.

I hereby certify that the notice hereto attached of Benj. H. Berry, clerk, John Howard, p. q., in suit of Wright, adm'r, vs. The National Express and Transportation Co. and others, was published in "The State" newspaper once a week for four weeks, the first insertion being on the 6th day of August, 1879.

RICHARD F. BEIRNE, Editor, &c.,
for CHAMBERLAYNE & BEIRNE,
Owners and Editors of "The State."

In the clerk's office of the Chancery court of the city of Richmond, the 29th day of September, 1879, John A. Meanley this day made oath before me that he did on the 1st day of September, 1879, that being the first day of the September term of the Hustings court of said city, post a copy of the annexed order of publication at the front door of the new City Hall, in which said Hustings court holds its session.

J. T. POINDEXTER, Dep. Clerk.

And at the same day—to-wit: At a Chancery Court of the city of Richmond, continued by adjournment and held for said city on the 6th day of October, 1879:

John W. Wright, sheriff of the city of Richmond, and as such administrator of W. W. Glenn, deceased, who sues on behalf of himself and other creditors of the National Express and Transportation Co., Plaintiff,

against

The National Express and Transportation Co., W. H. Perot, Wm. Devries, D. J. Foley, Jos. R. Anderson, F. P. Zimmerman, J. Carter Mowbray, W. H. Webb, Lorenzo Norvell, M. B. Poitiaux, John Blair Hoge, and John J. Kelly, trustees, Defendants.

This day this cause came on to be heard upon the original and amended bills taken for confessed as to all of the defendants, except M. B. Poitiaux and Joseph R. Anderson, upon the several answers of the said Poitiaux and Anderson (that of the said Anderson being this day filed by leave of court) with replications thereto, and exhibits filed, and was argued by counsel:

On consideration whereof, it is adjudged, ordered and decreed, that one of the commissioners of this court do inquire and report:

1. An account of the debts due by the said defendant, the National Express and Transportation Company, and the priorities thereof, if any.

2. An account of the assets of said defendant company.

And such commissioner is directed to report specially any matters deemed pertinent by him or which he may be required to state by any of the parties.

Any party to the cause may be examined before such commissioner, and all or any books, papers and documents of the said defendant company in the possession of any party may be called for and required to be produced.

And it is further ordered that notice of the time and place of taking the said accounts be published once a week for four successive weeks in the *State* newspaper published in the city of Richmond, and that such publication shall be equivalent to personal service of such notice on the parties to this cause.

The answer of Joseph R. Anderson referred to in foregoing decree is in the words and figures following, to-wit:

ANSWER OF JOS. R. ANDERSON.

TO THE HON. EDWARD H. FITZHUGH,

Judge of the Chancery Court of the city of Richmond:

The separate answer of Joseph R. Anderson, one of the defendants to an original, amended and supplemental bill of complaint exhibited against him and others in the Chancery Court of the city of Richmond by John W. Wright, sheriff of the said city, and as such administrator in Virginia of W. W. Glenn, dec'd, complainant.

This respondent, reserving to himself the benefit of all just exceptions to the said original, amended and supplemental bill, for answer thereto, or to so much thereof as he is advised that it is material he should answer, answer and says: that he does not admit that he is a director in the National Express and Transportation Company, but that to the best of his knowledge and belief he resigned the directorship of the company very soon after his elec-

tion thereto; that moreover he does not remember ever having acted in the capacity of director of the said company at a single one of its meetings. And he prays to be hence dismissed with his reasonable costs by him in this behalf expended, and he will ever pray, &c.

JOSEPH R. ANDERSON,
Defendant.
JAMES ALFRED JONES,
J. F. T. ANDERSON, p. d.

VIRGINIA—*City of Richmond, to-wit:*

This day personally appeared before me, Tazewell Ellett, a notary public for the city and State aforesaid, Joseph R. Anderson, whose answer is above written, and made oath that the statements contained in the said answer are true.

Given under my hand this 6th day of October, in the year 1879.

TAZEWELL ELLETT, N. P.

And at another day—to-wit: At a Chancery Court of the city of Richmond, continued by adjournment and held for the said city, on the 6th day of November, 1879:

John W. Wright, sheriff of the city of Richmond, and as such adm'r of W. W. Glenn, dec'd, who sues on behalf of himself and other creditors of the National Express and Transportation Company, Plaintiff,
against
The National Express and Transportation Co. and others, Defendants.

This day came the Baltimore and Ohio Railroad Company, by John Howard, its attorney, and by leave of court filed its petition praying to be made a party co-plaintiff in the above entitled suit, upon the terms of sharing the costs and benefits of the same; and thereupon it is considered and ordered that the said Baltimore and Ohio railroad be, and it is hereby, made a party co-plaintiff in the said suit, and placed upon an equal footing as the original plaintiff therein; and it is further ordered that the claims of the said railroad company be referred for inquiry and report to O. G. Kean, Esq., the master or commissioner having in charge the execution of the decree of this court of the 7th day of October, 1879, directing an inquiry to be made of the debts and assets of the said defendant, The National Express and Transportation Company.

The petition of the Baltimore and Ohio Railroad Co., referred

to in foregoing decree, is in the words and figures following, to-wit:

PETITION OF BALT. & OHIO R. R. CO.

W. W. Glenn's adm'r, who sues, &c.,
vs.
The National Express and Transportation Company and others,
} In the Chancery Court of the city of Richmond.

The petition of the Baltimore and Ohio Railroad Company, a company chartered by the State of Maryland, respectfully states that it is a creditor of the defendant, The National Express and Transportation Company, in the above entitled suit in two accounts, one for the sum of twenty-four hundred and seventy-four dollars and forty-six cents ($2,474.46), with interest at the rate of seven per cent. per annum from the 1st day of March, 1866, till paid, and the other for the sum of forty-one thousand four hundred and thirty-two dollars and thirty-eight cents ($41,432.38), with like interest from the 1st day of January, 1867, until paid. Copies of which said accounts, marked respectively B. & O. R. R., No. 1, and B. & O. R. R., No. 2, are herewith presented and prayed to be taken and considered as parts of this petition, being accounts of transportation of freight, &c., by your petitioner over its road for the said defendant company.

Your petitioner is informed that the above entitled suit is a creditor's bill, filed against the said defendant company for the benefit of the plaintiff and such other creditors of the said defendant as may come in and pay a proportionate part of the costs and share the benefits of said suit, and that an account has been ordered by this honorable court, to be taken before one of its masters or commissioners in chancery, of the debts and assets of said defendant company.

Your petitioner respectfully prays that it may be made a party plaintiff in said suit, and be placed upon an equal footing with the plaintiff upon the usual terms of sharing the costs and benefits of the suit, which your petitioner is willing to do; that its said claims may be established and paid; that they may be referred to the said master or commissioner for examination, proof and report; and that all such other further and general relief may be granted to your petitioner as the nature of its case may require, and to equity may seem meet; and it will ever pray, &c.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
By JOHN HOWARD, its attorney.

Nov. 6th, 1879.

JOHN HOWARD, p. q.

And at another day—to-wit: At a chancery court of the city of Richmond, continued by adjournment and held for said city on the 15th day of November, 1879,—

John W. Wright, sheriff of the city of Richmond, and as such adm'r of W. W. Glenn, dec'd, who sues on behalf of himself and other creditors of the National Express and Transportation Co., Plaintiff,
against
The National Express and Transportation Company and others, Defendants.

This day came the Bank of Commerce of Baltimore, by John Howard, its attorney, and by leave of court filed its petition praying to be made a party plaintiff in the above entitled suit, upon the terms of sharing the costs and benefits of the same; and thereupon it is considered and ordered that the Bank of Commerce of Baltimore be and it is hereby made a party co-plaintiff in the said suit and be placed upon an equal footing as the original plaintiff therein; and it is further ordered that the said claim of the said Bank of Commerce of Baltimore be referred for inquiry and report to O. G. Kean, Esq., the commissioner having in charge the execution of the decree of this court of the 7th day of October, 1879, directing an inquiry to be made of the debts and assets of the said defendant, the National Express and Transportation Company.

The petition of the Bank of Commerce of Baltimore referred to in foregoing decree is in the words and figures following, to-wit:

PETITION OF BANK OF COMMERCE.

W. W. Glenn's adm'r, who sues, &c.,
vs.
The National Express and Transportation Company and others.
} In the chancery court of the city of Richmond.

The petition of the Bank of Commerce of Baltimore respectfully states that it is a creditor of the defendant, The National Express and Transportation Company, in the above entitled suit in the sum of sventeen thousand seven hundred and fifty-five dollars and seventy cents ($17,625.70), with average interest thereon at the rate of seven per cent. per annum from the 4th day of July, 1868, until paid. An account of the items of which is presented herewith, marked B. C. B., and prayed to be taken as part of this petition, being a balance for money lent and advanced to the said defendant company by your petitioner.

Your petitioner is informed that the above entitled suit is a creditor's bill filed against the said defendant company for the benefit of the plaintiff and such other creditors of the said company as may come in and pay a proportionate part of the costs and share the benefits of said suit, and that an account has been ordered by this honorable court to be taken before one of its masters or commissioners of the debts and assets of the said defendant company.

Your petitioner respectfully prays that it may be made a party plaintiff in said suit and be placed upon an equal footing with the plaintiff upon the usual terms of sharing the costs and benefits of the suit, which your petitioner is willing to do; that its said claim may be established and paid, that it may be referred to the said commissioner for examination, proof and report; and that all such other, further and general relief may be granted to your petitioner as the nature of its case may require, and to equity may seem meet, and it will ever pray, &c.

THE BANK OF COMMERCE OF BALTIMORE,
By JOHN HOWARD, its attorney.

Nov. 14, 1879.

JOHN HOWARD, p. q.

And at the same day—to-wit: At a chancery court of the city of Richmond, continued by adjournment and held for said city on the 15th day of November, 1879,—

John W. Wright, sheriff of the city of Richmond, and as such adm'r. of W. W. Glenn, dec'd., who sues on behalf of himself and the other creditors of The National Express and Transportation Company, Plaintiff,

against

The National Express and Transportation Co. and others, Defendants.

This day came the Philadephia, *Delaware* and Baltimore Railroad Company, by John Howard, its attorney, and by leave of court filed its petition praying to be made a party co-plaintiff in the above entitled suit upon the terms of sharing the costs and benefits of the same; and thereupon it is considered and ordered that the said Philadelphia, Delaware and Baltimore Railroad Company be and it is hereby made a party co-plaintiff in the said suit, and placed upon an equal footing with the original plaintiff therein; and it is further ordered that the said claim of the Philadelphia, Delaware and Baltimore Railroad Company be referred to O. G. Keen, Esq., the commissioner having in charge the execution of the decree of this court of the 7th day of October, 1879, direct-

ing an inquiry to be made of the debts and assets of the said defendant, The National Express and Transportation Company.

The petition of the Philadelphia, Wilmington and Baltimore Railroad Co., referred to in the foregoing decree, is in the words and figures following, to-wit:

PETITION OF THE P., W. & B. R. R. Co.

W. W. Glenn's adm'r, who sues, &c.,
vs.
The National Express and Transportion Company and others.
} In the Chancery Court of the city of Richmond.

The petition of the Philadelphia, Wilmington and Baltimore Railroad Company respectfully states and charges that it was and is a corporation duly "organized under the laws of the State of Maryland; that it was and is a creditor of the said The National Express and Transportation Company for the following described acceptances, to-wit: one dated the 14th day of September, 1866, at one day's sight, payable to the order of H. F. Kenny, an officer of said Philadelphia, Wilmington & Baltimore Railroad Company, for the sum of nineteen hundred and one dollars and sixty cents, protested for non-payment on the 21st day of September, 1866; another dated the 21st day of September, 1866, at one day's sight, payable to the order of said Kenny, for sixteen hundred and forty-three dollars and twenty cents, protested for non-payment on the 28th day of September, 1866; another dated the 29th day of September, 1866, at one day's sight, payable to the order of said Kenny, for fifteen hundred and ninety-seven dollars and sixty cents, protested for non-payment on the 6th day of October, 1866; another dated the 13th day of October, 1866, at one day's sight, payable to the order of said Kenney, for seventeen hundred and sixty-nine dollars and sixty cents, protested for non-payment on the 23d day of October, 1866, together with costs of protest of said acceptances, to-wit: nine dollars and twenty-five cents, with interest on the amount of each acceptance as aforesaid from the respective dates at which they matured.

Your petitioner is informed that the above entitled suit is a creditor's bill filed against the said defendant company for the benefit of the plaintiff and such other creditors of the said defendant as may come in and pay a proportionate part of the costs and share the benefits of said suit, and that an account has been ordered by this honorable court, to be taken before one of its masters or commissioners in chancery, of the debts and assets of said defendant company.

Your petitioner respectfully prays that it may be made a party plaintiff in said suit, and be placed upon an equal footing with the

ber of shares of stock held in the National Express and Transportation Company, where they are held, the par value of such stock, the par value of the same less 20 per cent. heretofore assessed, and which has either been paid in or irrevocably lost, and finally an estimate of the assessment which will be necessary to pay the debts asserted in this suit, together with the expenses of collecting such assessment.

Respectfully submitted,

OTHO G. KEAN, Comm'r.

Comr's fee, $100.

Note.—I was requested by counsel to give an estimate of the probable expenses of collecting the assessment on the stock of the def't co. But on reflection think it better that the amount should be fixed by the court, when the assessment made on account of creditors can easily be enlarged so as to include that on account of costs, &c.

O. G. K., Comm'r.

STATEMENT No. 1.

Class 1.

1866.			
Oct. 31	—Due Baltimore and Ohio R. R. Co.,	41,432 38	
	Less credit—See exhibit "B. & O. R. R.,"	141 75	
	Balance due,	41,290 63	
	Interest thereon from Oct. 31, 1866, to June 1, 1880, 13 years and 7 months, at 6 per cent.,	33,651 86	
1880.			
June 1	—Total principal and interest due to date,	74,942 49	74,942 49
1868.			
July 4	—Due Bank of Commerce (Baltimore),	17,479 68	
	Interest thereon from July 4,		

	1868, to June 1, 1880, 11 years 10 months 27 days,	12,489 23	
	Total principal and interest due to date,	29,968 91	29,968 91
			104,911 40
1870.			
June 24	—Due William W. Glenn,	42,531 31	
	Costs,	8 65	
	Interest on $42,531.31 from June 24, 1870, to June 1, 1880, 9 years 11 months 6 days,	25,348 66	
1880.			
June 1	—Total principal and interest to date,	67,888 62	67,888 62

Memo. by com'r. The debt of W. W. Glenn's adm'r, though appearing on this page, does not belong to Class 1, but to Class 2, in which it is estimated and included

O. G. KEAN, Com'r.

Class 2.

1867.			
March 11	—Due Francis Murray for the use of John R. Terry,	13,683 67	
	Costs,	648 49	
	Interest on $13,683.67 from March 11, 1867, to June 1, 1880, 13 years 2 months 20 days,	10,855 70	
1880.			
June 1	—Total principal and interest due to date,	25,187 86	25,187 86
1867.			
March 11	—Due Henry M. Bach, trustee, &c.,	84,838 83	
	Interest thereon from March		

	11, 1867, to June 1, 1880, 13 years 2 months 20 days,	67,305 47	
	Total principal and interest due to date,	152,144 30	152,144 30
1879.			
Sept. 19	—Due Luke H. Miller,	3,748 83	
	Costs,	42 15	
	Interest on $3,748.83 from Sept. 19, 1879, to June 1, 1880, 8 months and 12 days,	157 45	
1880.			
June 1	—Total principal and interest due to date,	3,948 43	3,948 43
1867.			
March 23	—Due Fulton & Walker,	527 36	
	Costs,	9 87	
	Interest on $527.36 from March 23, 1867, to June 1, 1880, 13 years 2 mos. 7 days,	417 23	
1880.			
June 1	—Total principal and interest due to date,	954 46	954 46
1866.			
April 2	—Due Robert Higgins,	1,733 50	
	Less this sum paid him by sheriff Ohio Co., W. Va.,	836 92	
	Balance due,	896 58	
	Costs,	37 75	
	Interest on $896.58 from April 2, 1866, to June 1, 1880, 14 years 2 months,	762 09	
1880.			
June 1	—Total principal and interest due to date,	1,696 42	1,696 42
1866.			
Sept. 1	—Due George McMaster,	731 93	
	Interest thereon from Sept. 1,		

	1866, to June 1, 1880—13 years, 9 months,	603 84	
1880.			
June 1	—Total principal and interest due to date,	1,335 77	
			1,335 77
	Carried forward,		185,267 24
	Bro't forward,		185,267 24
1867.			
March 9	—Due Pennsylvania Company for insurance on lives and granting annuities, trustee under the will of Sarah B. Vansyckel,	1,280 00	
	Costs,	14 87	
	Interest on $1,280.00 from March 9, 1867, to June 1, 1880—13 years, 2 mos., 22 day,	1,015 69	
1880.			
June 1	—Total principal and interest due to date,	2,310 56	
			2,310 56
1866.			
Nov. 16	—Due Gardner T. Getty,	151 33	
	Less this sum received on account,	85 30	
	Balance due,	66 03	
	Costs,	45 45	
	Interest on $66.03 from Nov. 16, 1866, to June 1, 1880—13 years, 6 mos., 15 days,	53 65	
1880.			
June 1	—Total principal and interest due to date,	165 13	
			165 13
1866.			
Dec. 4	—Due Arthur Shaff,	168 28	
	Costs,	20 75	
	Interest on $168.28 from Dec. 4		

4, 1866, to June 1, 1880— 13 years, 5 mos., 27 days,	136 23	
1880. June 1—Total principal and interest due this day,	325 25	325 25
1867. Jan'y 31—Due M. B. Poitiaux,	300 00	
Interest thereon from Jan'y 31, 1867, to June 1, 1880— 13 years, 4 mos.,	240 00	
1880. June 1—Total principal and interest due this day,	540 00	540 00
1867. Jan'y 15—Due J. P. McCorkle,	250 00	
Interest thereon from Jan'y 15, 1867, to June 1, 1880— 13 years, 4½ months,	200 62	
1880. June 1—Total principal and interest due this day,	450 62	450 62
1868. Sept. 13—Due Philadelphia, Wilmington & Baltimore R. R. Co.,	7,736 74	
Interest on $6,921.25 (principal of above sum) from Sept. 13, 1868, to June 1, 1880—11 years., 8 mos., 18 days,	4,865 63	
1880. June 1—Total principal and interest due this day,	12,602 37	12,602 37
Carried forward,		201,661 17
Brought forward,		201,661 17
1867. March 1—Due John J. Kelly,	2,383 47	
Interest thereon from March		

	1, 1867, to June 1, 1880—13 years, 3 months,	1,894 85	
1880. June 1	—Total prin'l and interest due to date,	4,278 32	4,278 32
1866. Nov'r 15	—Due Louis Stix & Co.,	500 00	
	Interest thereon from Nov'r, 1866, to June 1, 1880—13 years, 6 months, 15 days,	406 25	
1880. June 1	—Total prin'l and interest due to date,	906 25	906 25
1880. June 1	—Burton W. Harrison, am't due him this date, all principal,		2,850 00
1866. Sept. 1	—Due Wilmington & Weldon R. R. Co.,	970 73	
	Interest thereon from Sept. 1 1866, to June 1, 1880, 13 years, 9 months,	800 85	
1880. June 1	—Total principal and interest due to date,	1,771 58	1,771 58
1866. Oct. 1	—Due Rich'd, Fred. & Poto. R. R. Co.,	5,353 24	
	Interest thereon from Oct. 1, 1866, to June 1, 1880, 13 years, 8 months,	4,389 65	
1880. June 1	—Total principal and interest due this day,	9,742 89	9,742 89
1866. Oct. 1	—Due Seaboard & R. R. R. Co.,	597 88	
	Interest thereon from Oct. 1,		

	1866 to June 1, 1880, 13 years, 8 months,	490 26	
1880.			
June 1	—Total principal and interest due to date,	1,088 14	
			1,088 14
1866.			
Oct. 1	—Potomac Ferry Co.,	290 87	
	Interest thereon from Oct. 1, 1866, to June 1, 1880, 13 years, 8 months,	238 51	
1880.			
June 1	—To principal and interest due to date,	529 38	
			529 38
	Carried forward,		222,827 73
	Brought forward,		222,827 73
1866.			
Dec. 1	—Due North Eastern R. R. Co.,	812 27	
	Interest thereon from Dec. 1, 1866, to June 1, 1880, 13 years, 6 months,	657 94	
1880.			
June 1	—Total principal and interest due this day,	1,470 21	
			1,470 21
		3,295 10	
1866.			
Dec'r 1	—Due S. C. Railroad Company, 938 60		
		4,233 70	
	Interest thereon from Dec. 1, 1866, to June 1, 1880, 13 years, 6 months,	3,449 30	
1880.			
June 1	—Total principal and interest, due this day,	7,683 00	
			7,683 00
1866.			
Oct'r 1	—Due the Charlotte, Columbia & Augusta Railroad Com-		

	pany to the Charlotte and South Carolina Railroad Co.,	881 27	
	Interest thereon from Oct. 1, 1866, to June 1, 1880, 13 years, 8 months,	722 64	
1880.			
June 1	—Total principal and interest due this day,	1,603 91	
			1,603 91
1866.			
Nov'r 1	—Due Baltimore Steam Packet Co.,	347 76	
	Interest thereon from Nov'r 1, 1866, to June 1, 1880, 13 years, 7 months,	283 42	
1880.			
June 1	—Total principal and interest due this day,	631 18	
			631 18
1866.			
Aug'st 1	—Due L. R. Smoot,	770 00	
	Interest thereon from Aug. 1, 1866, to June 1, 1880, 13 years, 10 months,	639 10	
1880.			
Jan'y 1	—Total principal and interest due this day,	1,409 10	
			1,409 10
1867.			
Jan'y 1	—Due J. T. M. Barnes,	356 66	
	Interest thereon from Jan'y 1, 1867, to June 1, 1880, 13 years, 5 months,	287 11	
1880.			
June 1	—Total principal and interest due this day,	643 77	
			643 77
	Carried forward,		236,268 90

	Brought forward,		236,268 90
1866.			
Nov'r 1	—Due Gen. Jos. E. Johnston,	2,477 75	
	Interest thereon from Nov. 1, 1866, to June 1, 1880, 13 years, 7 months,	2,019 36	
1880.			
June 1	—Total principal and interest due this day,	4,497 11	4,497 11
1866.			
Dec'r 4	—Due Richard T. Allison,	167 50	
	Costs,	18 05	
	Interest on $167.50 from Dec. 4, 1866, to June 1, 1880, 13 years, 5 mos., 27 days,	135 56	
1880.			
June 1	—Total principal and interest due this day,	321 11	321 11
1866.			
Dec'r 1	—Orange and Alexandria Railroad Co.,	3,144 70	
	Costs,	7 60	
	Interest on $3,144.70 from Dec'r 1, 1866, to June 1, 1880, 13 years, 6 mos.,	254 72	
1880.			
June 1	—Total principal and interest due this day,	3,407 02	3,407 02
1867.			
Jan'y 1	—Franklin Harrison,	137 50	
	Costs,	22 60	
	Interest on $137.50 from Jan. 1, 1867, to June 1, 1880, 13 years, 5 months,	110 69	
1880.			
June 1	—Total principal and interest due this day,	270 79	270 79

1866.			
Oct'r 20—Andrew J. Joyce & Co.,	90 76		
Costs,	39 90		
Interest on $90.76 from Oct. 20, 1866, to June 1, 1880, 13 years, 7 mos.,	73 97		
1880.			
June 1—Total principal and interest due this day,	204 63		
			204 63
Carried forward,			244,969 56
Brought forward,			244,969 56
1866.			
Sept. 20—John D. Imboden,	1,456 56		
Costs,	7 82		
Interest on $1,456.56 from 20 Sept., 1866, to Jan. 1, 1867, 3 mo., 11 days,	24 85		
1867.			
Jan'y 1—Balance,	1,489 23		
1—Cr. by payment,	565 09		
Balance,	924 14		
Interest on balance from Jan. 1, 1867, to Feb'y 1, 1867, 1 month,	4 62		
Balance,	728 76		
Feb'y 1—Cr. by payment,	534 96		
Balance,	393 80		
Interest from Feb. 1, 1867, to May 1, 1867, 3 mos.,	5 90		
Balance,	399 70		
May 1—Cr. by payment,	233 70		
Balance,	166 00		
Interest from May 1, 1867, to June 1, 1880, 13 years, 1 month,	129 89		

1880.			
June 1—Total principal and interest due to date,		295 89	
			295 89
1866.			
Sept. 20—Ould & Carrington,		2,000 00	
Costs,		7 82	
Interest from 20 Sept., 1866, on $2,000.00 to Jan'y 1, 1867,		33 33	
Balance,		2,041 15	
Cr. by payment,		775 17	
Balance,		1,265 98	
Interest on balance from Jan. 1, 1867, to June 1, 1880, 13 years, 5 months,		1,022 11	
1880.			
June 1—Total principal and interest due to date,		2,288 09	
			2,288 09
Carried forward,			247,553 54
Brought forward,			247,553 54
1866.			
Sept. 20—John B. Baldwin		2,000 00	
Costs,		7 82	
Interest from 20 Sept., 1866, to Jan'y 1, 1867, 3 mos. 10 days		33 33	
Balance,		2,041 15	
1867.			
Jan'y 1—Cr. by payment,	251 18		
Cr. by payment,	775 17		
		1,026 35	
Balance,		1,014 80	
Interest on balance from Jan'y 1, 1867, to June 1, 1880, 13 years 5 months,		794 76	
1880.			
June 1—Total principal and interest due to date,		1,809 56	
			1,809 56

1866.				
Sept. 20—	Page & Maury,		2,400 00	
	Costs,		7 82	
	Interest from Sept. 20, 1866, to Jan'y 1, 1867, on $2,400, 3 mos. 11 days,		40 00	
	Balance.		2,447 82	
1867.				
Jan'y 1—	Cr. by payment,	300 69		
	Cr. by payment,	929 79		
			1,230 48	
	Balance,		$1,218 34	
	Interest on balance from 1, Jan'y, 1867, to Jan'y 17, 1877,		3 45	
	Balance,		$1,220 79	
Jan'y 17—	Cr. by payment,		158 83	
	Balance,		1,061 96	
	Interest on balance from Jan'y 17, 1867, to June 1, 1880, 13 years 4 mos. 14 days,		853 04	
1880.				
June 1—	Total principal and interest due to date,		1,915 09	
				1,915 09
				251,278 10
June 1—	Due William W. Glenn, prin'l, int. and costs to date and brought here from Class, 1, in which it improperly appears,			67,888 62
	Total principal and interest to date, Brought forward,			319,166 72
1867.				
June 1—	Due S. D. Childs,		75 00	
	Interest thereon to June 1, 1880, 13 years.			
June 1—	Due John Biddle,		50 00	
	Interest thereon to June 1, 1880, 13 years.			
June 1—	Due "National Intelligencer,"		124 19	

	Interest thereon to June 1, 1880, 13 years.		
June	1—Due E. R. Cunningham,	12	75
	Interest thereon to June 1, 1880, 13 years.		
June	1—Due H. P. Gilbert & Co.,	12	00
	Interest thereon to June 1, 1880, 13 years.		
June	1—Due publisher of "Chronicle,"	259	88
	Interest thereon to June 1, 1880, 13 years.		
	Due John Farrell,	19	48
	Interest thereon to June 1, 1880, 13 years.		
June	1—Due J. W. Naim & Bro.,	65	21
	Interest thereon to June 1, 1880, 13 years.		
June	1—Due Thos. Ware & Thos. Kelly,	33	00
	Interest thereon to June 1, 1880, 13 years.		
June	1—Due Palmer & Sly,	42	50
	Interest thereon to June 1, 1880, 13 years.		
June	1—Due Jas S. Tapham & Co.,	29	32
	Interest thereon to June 1, 1880, 13 years.		
June	1—Due R. P. Buford,	20	23
	Interest thereon to June 1, 1880, 13 years.		
June	1—Due Oscar T. Keeler,	1,242	34
	Interest thereon to June 1, 1880, 13 years.		
June	1—Due M. W. Hutcheson,	350	00
	Interest thereon to June 1, 1880, 13 years.		
June	1—Due T. Titcomb,	7	25
	Interest thereon to June 1, 1880, 13 years.		
June	1—Due Henry St. Paul & Co.,	25	00
	Interest thereon to June 1, 1880, 13 years.		
June	1—Due James Conning,	5	00
	Interest thereon to June 1, 1880, 13 years.		
			2,378 15

	Brought forward,	2,373	15
1867.			
June	1—Due Edward Shloss,	229	87
	Interest thereon to June 1, 1880, 13 years.		
June	1—Due Pitty & Sawyer,	640	00
	Interest thereon to June 1, 1880, 13 years.		
June	1—"Mobile Daily Tribune,"	31	00
	Interest thereon to June 1, 1880, 13 years.		
June	1—Due "Adventure & Register,"	187	50
	Interest thereon to June 1, 1880, 13 years.		
June	1—Due Young & Woods,	2,000	00
	Interest thereon to June 1, 1880, 13 years.		
June	1—Due Charles W. Field,	366	00
	Interest thereon to June 1, 1880, 13 years.		
June	1—Due Sims & Hamilton,	33	00
	Interest thereon to June 1, 1880, 13 years.		
June	1—Due F. E. Marks,	214	40
	Interest thereon to June 1, 1880, 13 years.		
June	1—Due R. A Jeffrey,	28	00
	Interest thereon to June 1, 1880, 13 years.		
June	1—Due Floyd McCulloch,	58	33
	Interest thereon to June 1, 1880, 13 years,		
June	1—Due C. M. McMullin,	5	57
	Interest thereon to June 1, 1880, 13 years.		
June	1—Due Berger & Hoffman,	8	65
	Interest thereon to June 1, 1880, 13 years.		
June	1—Due S. Downey,	91	33
	Interest thereon to June 1, 1880, 13 years.		
June	1—Due S. E. Leps,	40	50
	Interest thereon to June 1, 1880, 13 years.		
June	1—Due James D. P. Fenton,	100	00
	Interest thereon to June 1, 1880, 13 years.		

June	1—Due S. E. Poor,	80 00	
	Interest thereon to June 1, 1880, 13 years.		
June	1—Due Sperdth & Indeinden,	14 50	
	Interest thereon to June 1, 1880, 13 years.		
June	1—Due J. C. Orr & Co.,	6 05	
	Interest thereon to June 1, 1880, 13 years.		
June	1—Due Walters & Kruft,	12 00	
	Interest thereon to June 1, 1880, 13 years.		
			6,529 85
1867.			
June	1—Due J. H. Logan & Co.,	1 00	
	Interest thereon to June, 1, 1880, 13 years.		
June	1—Due Bushfield, Wallace & Co.,	1 10	
	Interest thereon to June 1, 1880, 13 years.		
June	1—Due J. W. Houck,	39 00	
	Interest thereon to June 1, 1880, 13 years.		
June	1—Due Hamilton & Nagle,	2 00	
	Interest thereon to June 1, 1880, 13 years.		
June	1—Due Wheeling Intelligencer,	41 65	
	Interest thereon to June 1, 1880, 13 years.		
June	1—Due Wheeling Register,	35 00	
	Interest thereon to June 1, 1880, 13 years.		
June	1—Due John G. Justice,	130 00	
	Interest thereon to June 1, 1880, 13 years.		
June	1—Due Thos. K. Davis,	92 94	
	Interest thereon to June 1, 1880, 13 years.		
June	1—Due J. Reynolds,	45 00	
	Interest thereon to June 1, 1880, 13 years.		
June	1—Due D. S. Ryan,	61 00	
	Interest thereon to June 1, 1880, 13 years.		
June	1—Due Atlantic & N. C. R. R. Co.,	525 67	

		Interest thereon to June 1, 1880, 13 years.		
June	1	—Due Raleigh & Gaston R. R. Co.,	1,195 33	
		Interest thereon to June 1, 1880, 13 years.		
June	1	—Due C. W. Starbuck & Co.,	30 00	
		Interest thereon to June 1, 1880, 13 years.		
June	1	—Due Fitch & Bro.,	17 00	
		Interest thereon to June 1, 1880, 13 years.		
June	1	—Due D. McFarland,	10 00	
		Interest thereon to June 1, 1880, 13 years.		
June	1	—Due J. W. Newman,	6 00	
		Interest thereon to June 1, 1880, 13 years.		
June	1	—Due E. Raine,	2 00	
		Interest thereon to June 1, 1880, 13 years.		
June	1	—Due Brown & Davis,	19 15	
		Interest thereon to June 1, 1870, 13 years.		
June	1	—Due Sam'l Blair & Co.,	26 60	
		Interest thereon to June 1, 1880, 13 years.		
			———	8,810 28
1867.				
June	1	—Due F. E. Suire & Co.,	13 82	
		Interest thereon to June 1, 1880, 13 years.		
June	1	—Due C. B. Prather & Co.,	10 75	
		Interest thereon to June 1, 1880, 13 years.		
June	1	—Due Maguire & Co.,	6 20	
		Interest thereon to June 1, 1880, 13 years.		
June	1	—Due Anderson & McFarland,	11 91	
		Interest thereon to June 1, 1880, 13 years.		
June	1	—Due Wm. Huddart & Co.,	3 00	
		Interest thereon to June 1, 1880, 13 years.		
June	1	—Due J. B. Shroder,	3 75	
		Interest thereon to June 1, 1880, 13 years.		

June	1—Due H. G. Strobel, Interest thereon to June 1, 1880, 13 years.	5 00	
June	1—Western Union Telegraph Co., Interest thereon to June 1, 1880, 13 years.	150 00	
June	1—Due John M. Owen, Interest thereon to June 1, 1880, 13 years.	8 50	
June	1—Due Smith, Hawley & Co., Interest thereon to June 1, 1880, 13 years.	35 00	
June	1—Due J. Black, Interest thereon to June 1, 1880, 13 years.	16 67	
June	1—Due Capatnus Shaffer, Interest thereon to June 1, 1880, 13 years.	6 25	
June	1—Due R. B. Smith, Interest thereon to June 1, 1880, 13 years.	40 00	
June	1—Due Peter Hoffman, Interest thereon to June 1, 1880, 13 years.	9 00	
June	1—Due J. Taylor, Interest thereon to June 1, 1880, 13 years.	10 00	
June	1—Due P. Doherty, Interest thereon to June 1, 1880, 13 years.	20 00	
June	1—Due John Taylor, Interest thereon to June 1, 1880, 13 years.	10 00	
			9,170 14
1867.			
June	1—Due John Dean, Interest thereon to June 1, 1880, 13 years.	22 50	
June	1 Due C. D. B. Webster, Interest thereon to June 1, 1880, 13 years.	83 00	
June	1—Due W. H. Glenn, Interest thereon to June 1, 1880, 13 years.	75 00	
June	1—Due. E. Winchester,	69 34	

	Interest thereon to June 1, 1880, 13 years.		
June	1—Due J. J. Graham,	80 00	
	Interest thereon to June 1, 1880, 13 years.		
June	1—Due J. L. Hawk,	47 83	
	Interest thereon to June 1, 1880, 13 years.		
June	1—Due R. C. Kinkead,	110 80	
	Interest thereon to June 1, 1880, 13 years.		
June	1—Due Sherman Bailey,	35 00	
	Interest thereon to June 1, 1880, 13 years.		
June	1—Due Earhart Bumans,	40 00	
	Interest thereon to June 1, 1880, 13 years.		
June	1—Due John Murphy,	20 83	
	Interest thereon to June 1, 1880, 13 years.		
June	1—Due F. W. Winchester,	25 00	
	Interest thereon to June 1, 1880, 13 years.		
June	1—Due William Grimes,	40 00	
	Interest thereon to June 1, 1880, 13 years.		
June	1—Due E. Shaffer,	50 00	
	Interest thereon to June 1, 1880, 13 years.		
June	1—Due G. H. Swift,	15 00	
	Interest thereon to June 1, 1880, 13 years.		
June	1—Due H. M. Cottingham,	585 66	
	Interest thereon to June 1, 1880, 13 years.		
June	1—Due J. H. McDade,	100 00	
	Interest thereon to June 1, 1880, 13 years.		
June	1—Due F. A. B. Jennings,	56 66	
	Interest thereon to June 1, 1880, 13 years.		
			10,626 76
1867.			
June	1—Due R. W. Atwell,	75 00	
	Interest thereon to June 1, 1880, 13 years.		
June	1—Due P. S. Johnson,	108 33	

	Interest thereon to June 1, 1880, 13 years.	
June	1—Due R. M. Demere,	95 00
	Interest thereon to June 1, 1880, 13 years.	
June	1—Due H. C. Grubb,	131 65
	Interest thereon to June 1, 1880, 13 years.	
June	1—Due Hunter & Gammell,	384 88
	Interest thereon to June 1, 1880, 13 years.	
June	1—Due A. H. Coutes,	30 00
	Interest thereon to June 1, 1880, 13 years.	
June	1—Due J. H. Nicholas,	90 62
	Interest thereon to June 1, 1880, 13 years.	
June	1—Due C. M. Davis,	6 70
	Interest thereon to June 1, 1880, 13 years.	
June	1—Due J. T. Jenkens & Co.,	16 60
	Interest thereon to June 1, 1880, 13 years.	
June	1—Due C. W. & W. R. J. Long, & Billups,	59 41
	Interest thereon to June 1, 1880, 13 years.	
June	1—Due J. J. Ford,	52 00
	Interest thereon to June 1, 1880, 13 years.	
June	1—Due Ogletree & Grubbs,	52 75
	Interest thereon to June 1, 1880, 13 years.	
June	1—Due S. S. Herman,	67 35
	Interest thereon to June 1, 1880, 13 years.	
June	1—Due J. A. Witherspoon,	66 90
	Interest thereon to June 1, 1880, 13 years.	
June	1—Due the Town of Athens, Ga.,	22 00
	Interest thereon to June 1, 1880, 13 years.	
June	1—Due Mrs. C. A. Johnson,	315 00
	Interest thereon to June 1, 1880, 13 years.	
June	1—Due E. R. Hodgson & Bro.,	23 00

EXTRACT FROM THE COURIER-JOURNAL,
LOUISVILLE, OCTOBER 31ST, 1885.

JUDGE BAXTER'S DECISION.

The recent ruling of Judge Baxter, of the Circuit Court of the United States, in the suits brought to compel stockholders of the old National Express and Transportation Company to pay up calls assessed by the Richmond Chancery Court, has attracted much attention. The corporation was organized at the close of the war, with Gen. Joseph E. Johnston as the President. Its subscribed capital was several million dollars, but it made an assignment within a year, and its large debt is now being paid by stock calls. There has been a good deal of litigation growing out of it. Judge Baxter delivered no written opinion, but the following is the substance of his oral decision, as the counsel on both sides agree:

UNITED STATES CIRCUIT COURT, DISTRICT OF KENTUCKY,

OCTOBER 21ST, 1885.

GLENN, TRUSTEE *vs.* JACKSON. GLENN, TRUSTEE *vs.* CALLAWAY.

(ORAL OPINION—BAXTER, JUDGE.)

Judge Baxter remarked that the questions presented went to two points, the first being the capacity of the plaintiff, Glenn, to maintain any suit against a stockholder of the National Express and Transportation Company; the second being that of limitation in behalf of a stockholder as against any suit brought by Glenn, Trustee.

The first point, as to capacity to sue, he remarked was entirely free from difficulty, and was solved by the very language of the decree of the Richmond Chancery Court, whereby Glenn was not only empowered, but, by all fair construction, ordered to bring those suits. He did not deem it necessary to delay further upon that point.

As to the second point, namely the limitation, Judge Baxter proceeded to say that it was clear from the declaration and the exhibit, filed, that the corporation which had its existence by charter, from the State of Virginia, made its assignment in September, 1866, to three trustees. By the terms of this deed of assignment, there passed from the corporation, and vested in the trustees, all the estate and property of every kind which the corporation heretofore had possessed. This assignment carried with it all the legal title and right of the corporation to unpaid subscriptions as well as other property. But it did not carry with it, as Judge Baxter construed the language, the *franchises* of the corporation; that is to say it did not empower the assignees named in the deed to do all that the Board of Directors of the corporation could do. In fact, the corporation still continued its legal existence, vested with certain franchises, and power of action, but divested by its own act of all of its valuable property. From this it followed, Judge Baxter said, that the corporation as a corporation could not claim the property so conveyed, and that the assignees as such could not exercise the corporate powers of a Board of Directors, and from this it followed that the trustees named in the deed of September, 1866, had no power to make a call upon the stockholders or levy any assessment, or compel any stockholder or the whole body of stockholders to pay up the whole or any part of what they might be found in arrears as to their stock subscriptions. In order to bring in and collect, for the benefit of the unpaid creditors of the corporation, those assets which were represented by the unpaid subscription, it became necessary, said Judge Baxter, for the Directors of the corporation (which corporation still subsisted under the terms of its charter, and which Directors were still unreplaced by other agencies) to make a formal call. This matter of making a call was primarily with the Directors, and the stockholders were in no wise bound to pay any call until it was made by the Board of Directors, or by a Court of equity upon the refusal or failure of the Board of Directors so to do.

The directors having failed to make any call upon the stockholders from the time of the assignment in 1866 up to November 1871, W. W. Glenn, a judgment creditor, filed a creditor's bill in the Chancery Court of Richmond, Va. The prayers and allegations of that bill were appropriate and resulted in a decree, part of which decree was an assessment and call upon the stockholders. The directors having failed to make a call, it was undoubtedly competent and necessary that a Court of equity should make it. The Court of equity at the same time appointed John Glenn trustee, with ample powers and directions as to the collection of the call so made. In such a case the doctrine of limitation has no application whatever, remarked Judge Baxter, and it certainly can not be said that there was any laches.

EXTRACT FROM THE DAILY STATE JOURNAL

PARKERSBURG, W. VA., JUNE 25, 1886.

A SUIT OF INTEREST TO STOCKHOLDERS—THE NATIONAL EXPRESS COMPANY SUCCEEDS IN COLLECTING ASSESSMENTS.

Judge Bond in the U. S. Circuit Court yesterday tried a case involving questions of interest to stockholders. The title of the case was John Glenn, Trustee, against W. J. Bland.

Proceedings were taken in the Chancery Court of the City of Richmond, Virginia, by creditors of the National Express and Transportation Company, in which suit a decree was entered setting forth and adjudicating, that the National Express and Transportation Company was incorporated by the Legislature of Virginia by an Act passed December 12th, 1865, and commenced business under a formal organization. The Stockholders paid in one or two per cent. at time of subscription, and the company made subsequent assessments of twenty per cent. on the capital stock, leaving 80 per cent. of subscriptions uncalled. Subsequently, the company executed a deed of trust for the benefit of its creditors, on the 20th day of September, 1866, assigning to three trustees all its property and assets, including the unpaid stock subscriptions. These trustees failed or refused to act, and on the 14th day of December, 1880, a final decree was entered in the Chancery suit in Richmond, whereby John Glenn was appointed and substituted as trustee under said deed of September 20th, 1866; the debts of the company were ascertained at some $500,000 and an assessment of 30 per cent. on the stockholders was made, which the substituted trustee, Glenn, was authorized to collect and directed to sue for. Glenn was required to give bond for $100,000, which was done on the 3rd day of January, 1881.

This present action at law was brought by Glenn, Trustee, in the Circuit Court against Bland, to collect the 30 per cent. assessed by the Richmond Chancery Court on 25 shares of stock held by Bland in the Express Company.

The case being tried by a jury the Court held that the decree of December 14th, 1880, was conclusive upon the National Express and Transportation Company, and upon its stockholders, as to every matter adjudicated and passed upon by that decree, and the record of the Chancery cause being authenticated and proven, the only question really at issue was whether this defendant was a subscriber to the stock on which he was being sued.

On the trial the plaintiff produced the books of the company, showing that the defendant appeared on the stock books and records of the company as the holder of 25 shares and was

thereon credited with five different assessments as paid by him; and it also appeared that a portion of his stock had been assigned back to the company, but that only 20 per cent. in all had been paid on the stock. No evidence was offered on behalf of the defendant. The Court instructed the jury:

"1. A person is presumed to be a stockholder when his name appears on the books of a company as a stockholder, and when he is sued as such the burden of disproving that presumption is cast upon him. And if the jury believe from the evidence that the defendant was a stockholder in the National Express and Transportation Company, or that he agreed to become a stockholder therein and paid the company money on account of its capital stock, then no assignment of such stock, unless the stock was fully paid up, would relieve the defendant from liability, and he is bound by the decree of the Chancery Court of the City of Richmond, Va., in evidence, to pay unto the plaintiff thirty dollars on each share of stock for which he is liable, with interest from the 3rd day of January, 1871, and the jury will so find.

"2. That as between creditors and a stockholder of an incorporated company, an agreement or arrangement between such company and a stockholder, that the stockholder shall be released from any part of the amount he agreed to pay into its capital stock, is void; and if the jury believe from the evidence that the defendant became a stockholder in the National Express and Transportation Company, then he cannot avoid his liability as such stockholder, by claiming that such company agreed to release him from liability on any of the stock held by him."

The case was argued by counsel and submitted to the jury, who returned a verdict in favor of the plaintiff for $750, with interest from the 3rd day of January, 1881.

The counsel for the National Express Company were W. W. Van Winkle and B. M. Ambler; for the defendant, J. B. Jackson, Judge Brannon and Caleb Boggess.

EXTRACT FROM THE DAILY STATE JOURNAL,

PARKERSBURG, W. VA., JUNE 26, 1886.

U. S. CIRCUIT COURT.

Chief Justice Waite and Judge Bond on the Liability of Stockholders.

The last of the several actions of John Glenn, Trustee, against Stockholders of the Express Company, was finally concluded on yesterday, with a verdict and judgment in favor of the plaintiff against G. D. Camden. Each of the cases previously tried had reached the same result; and the Camden case differed from those that preceded it mainly in the fact that the Chief Justice sat with Judge Bond until the legal questions had been disposed of.

A history of the transactions and proceedings leading up to these suits, was given in our issue of 25th inst.

The Trustee sues to recover an assessment of 30 per cent. on 50 shares of stock held by Judge Camden. This assessment was made by the Chancery Court of the City of Richmond, Va., by a decree of December 14th, 1880, under which Glenn was substituted as Trustee, under a deed made by the Company, assigning the unpaid stock subscriptions for the benefit of its creditors.

After the jury had been sworn, and the case had been stated by the respective sides, the plaintiff offered in evidence the record of the Richmond Chancery Court.

Judge Boggess, for Camden, objected to the introduction of the record, on the ground that the Chancery Court did not acquire jurisdiction of the Company by proper process, and that the defendant, Camden, was not an actual party to that suit. The objection was overruled and the record admitted.

The plaintiff then offered the Act of the General Assembly of Virginia, passed December 12, 1865. incorporating the National Express and Transportation Company; also, a copy of the minutes of the Executive Journal, of Virginia, showing that the Company had complied with the Act; and, also, a copy of the deed of trust made by the Company on Sept. 20th, 1866, to the trustees, in whose place Glenn had been substituted. These were admitted without objection.

The plaintiff then offered in evidence the stock ledger and books of original entry, including treasurer's blotters, certificate book, transfer book, etc., which were conceded to be the books of the Company.

To the introduction of these books the defendant objected, on the ground that they were not competent, and that the plaintiff should first prove the fact of subscription, or account for the non-

production of better evidence, before proceeding in this way. These questions were argued by both sides for some time. The Chief Justice, speaking for the Court, held that the books were proper to be admitted, and were *prima facie* evidence of the matters appearing therein, and overruled the points of the defence.

On these several books Camden's name appeared as stockholder to the number of 50 shares. He was credited with four several assessments paid; on the transfer book he appeared to have assigned back to the Company, "by P. T. Moore, attorney in fact," 25 of the shares, and through the several books, and on the stub of the certificate book, were entries, showing that Camden was stockholder. The plaintiff then testified that J. V. H. Allen, treasurer and secretary of the Company, and P. T. Moore, were dead, and that the plaintiff had produced every book and paper that he could find bearing upon the matters in issue. The plaintiff there rested his case.

The defendant then moved the Court to exclude the testimony of the plaintiff from the jury, on the grounds that the Chancery Court of Richmond had not jurisdiction to render the decree, and the books were not evidence unless the original contract of subscription was produced or accounted for. After lengthy argument, both grounds were overruled, Judges Waite and Bond both holding that the Chancery Court had duly acquired jurisdiction, and that the evidence offered was proper; and, further, that "this makes a *prima facie* case, and the burden of proof is on the defendant to show to the contrary."

The defendant introduced M. B. Portiaux, and offered to show, by him, that he was not cashier of the Company at the time that service was made on him, as such, in the Chancery cause. The plaintiff objected, and the objection was sustained. The Chief Justice, speaking for the Court, held: The jurisdiction of the Chancery Court was complete. The question of its jurisdiction over this Company was heard and adjudged by that Court. This very question was litigated and decided in the original suit, and that decision now binds this Court. The plaintiff's objection is sustained.

The defendant then testified in substance that he had searched his papers and sought to find if he had ever been connected with this Company. That he never had subscribed to its stock, or to the stock of any Express Company to the best of his knowledge and recollection. That he might be mistaken, but was quite sure he had never paid an assessment, and knew positively he never gave any power of attorney to P. F. Moore. That 20 years was a long time ago; but he felt satisfied he never subscribed or authorized his name to be used as a subscriber.

A contract of subscription in the possession of the plaintiff, bearing the defendant's name as subscriber to the National Express Company (which had not been offered by plaintiff) was then called for by the defendant, and was by him put in evidence with the statement that he never signed or authorized his name, but supposed his name had gotten on the books through that unauthorized medium.

The case was then argued by B. M. Ambler on behalf of the plaintiff, and by Judges Boggess and Brannon for the defendant. The Chief Justice was not present after the testimony was closed, and after the arguments of counsel Judge Bond gave the same instructions as on yesterday. The verdict was for $1,500, with interest from January 3rd, 1881, and judgment entered accordingly. Van Winkle & Ambler, for plaintiff; Hons. Caleb Boggess and John Brannon, for defendant.

Judge Baxter proceeded to say that he considered Scoville *vs.* Thayer, (105 U. S.,) as deciding beyond any controversy what must be the controlling doctrine in such cases; and expressed his dissent from the opinion rendered by Judge Brewer on the United States Circuit Court Bench, for the district of Missouri, in the case of Glenn, Trustee, against divers persons.

Judge Baxter continued that, it being apparently conceded that there was no denial of the fact of the subscription, he would instruct a jury peremptorily. The parties thereupon waived a jury, submitting the law and facts to the Court, and judgment was rendered against Jackson. The counsel for Callaway, the other defendant, urged reasons for a continuance, which counsel for Glenn recognized as weighty, and the Court gave Callaway a continuance to the next term.

BROWN, HUMPHREY and DAVIE, *for Glenn, Trustee;* D. W. SANDERS, *for Jackson;* S. B. TONEY, *for Callaway.*

	Interest thereon to June 1, 1880, 13 years.		
June	1—Due Nicholson, Moss & Hutcheson,	75 00	
	Interest thereon to June 1, 1880, 13 years.		
June	1—Due James Bond,	135 00	
	Interest thereon to June 1, 1880, 13 years.		
			$12,433 95
		$12,433 95	
June	1—Due Stockton & Co.,	96 87	
	Interest to June 1, 1880, 13 years.		
June	1—Due F. Arnold & Co.,	130 75	
	Interest to June 1, 1880, 13 years.		
June	1—Due G. A. Mercer,	25 00	
	Interest to June 1, 1880, 13 years.		
June	1—Due Roswell King,	100 15	
	Interest to June 1, 1880, 13 years.		
June	1—Due Alabama & Florida R. R. Co.,	214 34	
	Interest to June 1, 1880, 13 years.		
June	1—Due Mobile & Great Northern R. R. Co.,	155 82	
	Interest to June 1, 1880, 13 years.		
June	1—Due Selma & Meridian R. R. Co.,	174 89	
	Interest to June 1, 1880, 13 years.		
June	1—Due W. M. Keblinger,	95 50	
	Interest to June 1, 1880, 13 years.		
June	1—Due W. J. Keblinger,	100 00	
	Interest to June 1, 1880, 13 years.		
June	1—Due J. L. Brode,	134 15	
	Interest to June 1, 1880, 13 years.		
June	1—Due Edwin W. Wade,	37 66	

	Interest to June 1, 1880, 13 years.		
June	1—Due J. J. Terrill,	291 00	
	Interest to June 1, 1880, 13 years.		
June	1—Due J. B. Rhea,	40 91	
	Interest to June 1, 1880, 13 years.		
June	1—Margaret W. Day,	274 98	
	Interest to June 1, 1880, 13 years.		
June	1—Richmond & Danville R. R. Co.,	4,823 81	
	Interest to June 1, 1880, 13 years		
June	1—Va. Central R. R. Company,	1,968 43	
	Interest to June 1, 1880, 13 years.		
June	1—Richmond & Petersburg R. R. Co.,	351 19	
	Interest to June 1, 1880, 13 years.		
June	1—Petersburg R. R. Co.,	406 82	
	Interest to June 1, 1880, 13 years.		
			21,856 25
1867.			
June	1—"Richmond Dispatch,"	169 08	
	Interest to June 1, 1880, 13 years.		
	"Richmond Times,"	75 00	
	Interest to June 1, 1880, 13 years.		
	"Richmond Inquirer,"	121 00	
	Interest to June 1, 1880, 13 years.		
	"Va. Free Press,"	20 00	
	Interest to June 1, 1880, 13 years.		
	"Winchester Times,"	12 00	
	Interest to June 1, 1880, 13 years.		
	"Winchester News,"	10 00	
	Interest to June 1, 1880, 13 years.		
	L. H. Fitch,	36 95	

	Interest to June 1, 1880, 13 years.		
	E W. Anderson,	50 00	
	Interest to June 1, 1880, 13 years.		
	State of Virginia. Taxes,	516 72	
	Interest to June, 1880, 13 years.		
	City of Richmond. Taxes,	1,000 00	
	Interest to June 1, 1880, 13 years.		
June	1—Warwick & Barksdale,	54 50	
	Interest to June 1, 1880, 13 years.		
June	1—H. K. Douglas,	10 00	
	Interest to June 1, 1880, 13 years.		
June	1—D. T. Richards,	50 00	
	Interest to June 1, 1880, 13 years.		
June	1—J. B. Taylor,	5 00	
	Interest to June 1, 1880, 13 years.		
June	1—Merrin & Simpkins,	10 00	
	Interest to June 1, 1880, 13 years.		
June	1—L. A. Elliott,	94 50	
	Interest to June 1, 1880, 13 years.		
			24,091 00
1867.			
June	1—Benton H. Martin,	116 75	
	Interest to June 1, 1880, 13 years.		
June	1—N. W. Belcher & Co.,	200 00	
	Interest to June 1, 1880, 13 years.		
June	1—Stephen Lane,	255 00	
	Interest to June 1, 1880, 13 years.		
June	1—H. Danford,	9 00	
	Interest to June 1, 1880, 13 years.		
June	1—Abernathy & Co.,	92 37	
	Interest to June 1, 1880, 13 years.		
June	1—E. & H. T. Anderson & Co.,	355 41	

1867.

June 1	—Thos. P. Bacon, Interest to June 1, 1880, 13 years.	240 85
June 1	—Wm. C. Ford, Interest to June 1, 1880, 13 years.	90 10
June 1	—A. T. Lavallette, Interest to June 1, 1880, 13 years.	14 00
June 1	—C. C. Thompson, Interest to June 1, 1880, 13 years.	60 00
June 1	—David Bulst, Interest to June 1, 1880, 13 years.	60 00
June 1	—H. D. Basler, Interest to June 1, 1880, 13 years.	21 55
June 1	—Benj. Flood, Interest to June 1, 1880, 13 years.	17 58
June 1	—Edward Beans, Interest to June 1, 1880, 13 years.	38 32
June 1	—H. Montgomery, Interest to June 1, 1880, 13 years.	12 02
June 1	—B. W. Oakman, Interest to June 1, 1880, 13 years.	25 55
June 1	—John H. Maxwell, Interest to June 1, 1880, 13 years.	9 50
June 1	—James Millman, Interest to June 1, 1880, 13 years.	10 52
June 1	—Fred. Nagle, Interest to June 1, 1880, 13 years.	20 30
June 1	—Oglesby & Hoge, Interest to June 1, 1880, 13 years.	76 68
June 1	—James M. Cooper, Interest to June 1, 1880, 13 years.	49 25
June 1	—McCandless & Smith,	15 00

	Interest to June 1, 1880, 13 years.		
June	1—Tucker & Sapman,	647 59	
	Interest to June 1, 1880, 13 years.		
June	1—Weinstein & Bro.,	24 00	
	Interest to June 1, 1880, 13 years.		
June	1—McCall & Monteith,	29 68	
	Interest to June 1, 1880, 13 years.		
			30,382 74
1867.			
June	1—Fulton & Wilkes,	61 01	
	Interest to June 1, 1880, 13 years.		
June	1—Philip L. Justice,	90 80	
	Interest to June 1, 1880, 13 years.		
June	1—Andrew Johann & Co.,	6 06	
	Interest to June 1, 1880, 13 years.		
June	1—C. L. Cadwallader,	132 75	
	Interest to June 1, 1880, 13 years.		
June	1—Warner & Co.,	39 90	
	Interest to June 1, 1880, 13 years.		
June	1—E. Kelterhaus,	28 00	
	Interest to June 1, 1880, 13 years.		
June	1—James J. Martin,	282 25	
	Interest to June 1, 1880, 13 years.		
June	1—William Mann,	41 00	
	Interest to June 1, 1880, 13 years.		
June	1—R. McClure,	50 00	
	Interest to June 1, 1880, 13 years.		
June	1—James B. Smith & Co.,	166 44	
	Interest to June 1, 1880, 13 years.		
June	1—H. B. & A. Taylor,	100 00	
	Interest to June 1, 1880, 13 years.		
June	1—Tryon, Bros. & Co.,	259 18	

	Interest to June 1, 1880, 13 years.		
June	1—S. Bonaffon,	279 30	
	Interest to June 1, 1880, 13 years.		
June	1—Powers & Weightman,	132 50	
	Interest to June 1, 1880, 13 years.		
June	1—Boughman, Thomas & Co.,	12 25	
	Interest to June 1, 1880, 13 years.		
June	1—Thomas B. Eaton & Co.,	2 85	
	Interest to June 1, 1880, 13 years.		
June	1—A. A. Laws,	35 00	
	Interest to June 1, 1880, 13 years.		
			32,102 03
1867.			
June	1—F. A. Goddard,	27 93	
	Interest to June 1, 1880, 13 years.		
June	1—Dickerson & Robelen,	51 00	
	Interest to June 1, 1880, 13 years.		
June	1—W. A. Wisdom,	4 50	
	Interest to June 1, 1880, 13 years.		
June	1—Underwood & Connor,	15 00	
	Interest to June 1, 1880, 13 years.		
June	1—J. P. Smith,	18 00	
	Interest to June 1, 1880, 13 years.		
June	1—Wm. McCauley,	25 00	
	Interest to June 1, 1880, 13 years.		
June	1—Williamson & Co.,	180 19	
	Interest to June 1, 1880, 13 years.		
June	1—Louis Green,	80 00	
	Interest to June 1, 1880, 13 years.		
June	1—C. H. & M. House,	90 00	
	Interest to June 1, 1880, 13 years.		
June	1—Hollingsworth Warfield,	5,171 36	

	Interest to June 1, 1880, 13 years.			
June	1—Baltimore Gas Light Co., Interest to June 1, 1880, 13 years.		115 46	
June	1—Herman Born, Interest to June 1, 1880, 13 years.		32 25	
June	1—Adam Kahler, Interest to June 1, 1880, 13 years.		91 85	
June	1—Gibson & Kirk, Interest to June 1, 1880, 13 years.		36 40	
June	1—"Baltimore Sun," Interest to June 1, 1880, 13 years.		28 25	
June	1—Henry Roth, Interest to June 1, 1880, 13 years.		23 35	
June	1—Bibb & Co., Interest to June 1, 1880, 13 years.		2 00	
				38,094 57
			38,094 57	
1867.				
June	1—Fred'k Oelmann, Interest to June 1, 1880, 13 years.		14 66	
June	1—L. Green, Interest to June 1, 1880, 13 years.		112 20	
June	1—Caulfield, Bros. & Co., Interest to June 1, 1880, 13 years.		373 66	
June	1—Burton & Irving, Interest to June 1, 1880, 13 years.		31 00	
June	1—Andrews & Thompson, Interest to June 1, 1880, 13 years.		16 80	
June	1—George Brown, Interest to June 1, 1880, 13 years.		40 41	
June	1—George W. Webb & Co., Interest to June 1, 1880, 13 years.		25 00	

June	1—Hodges Bros., Interest to June 1, 1880, 13 years.	36 60	
June	1—Cushings & Bayly, Interest to June 1, 1880, 13 years.	31 62	
June	1—Schwardtman & Co., Interest to June 1, 1880, 13 years.	29 13	
June	1—Rudolph Oehl, Interest to June 1, 1880, 13 years.	88 33	
June	1—Daniel Seaton, Interest to June 1, 1880, 13 years.	115 00	
June	1—John Wakins, Interest to June 1, 1880, 13 years.	21 00	
June	1—A. J. Smith, Interest to June 1, 1880, 13 years.	60 00	
June	1—McC. Y. Barry, Interest to June 1, 1880, 13 years.	139 23	
June	2—W. H. C. Bayly, Interest to June 1, 1880, 13 years.	62 50	
June	1—Stephen Cremin, Interest to June 1, 1880, 13 years.	32 00	
June	1—George Bishop, Interest to June 1, 1880, 13 years.	30 00	
June	1—G. A. Schwartzman, Interest to June 1, 1880, 13 years.	43 88	
			39,397 59
June	1—F. B. Berkley, Interest to June 1, 1880, 13 years.	114 00	
June	1—Milton Bull, Interest to June 1, 1880, 13 years.	115 00	
June	1—Henry Vaughn, Interest to June 1, 1880, 13 years.	50 00	

June 1	—George Bond, Interest to June 1, 1880, 13 years.	57 05
June 1	—Andrew O'Meara, Interest to June 1, 1880, 13 years.	45 57
June 1	—James Hood, Interest to June 1, 1880, 13 years.	24 56
June 1	—W. H. Tibals, Interest to June 1, 1880, 13 years.	34 68
June 1	—Edward McGeehan, Interest to June 1, 1880, 13 years.	57 84
June 1	—F. Grill, Interest to June 1, 1880, 13 years.	19 25
June 1	—Jacob Arnold, Interest to June 1, 1880, 13 years.	13 00
June 1	—John Manly, Interest to June 1, 1880, 13 years.	23 57
June 1	—Thomas McCullough, Interest to June 1, 1880, 13 years.	25 00
June 1	—Thos. Burns, Interest to June 1, 1880, 13 years.	25 00
June 1	—A. Boyce, Interest to June 1, 1880, 13 years.	28 00
June 1	—F. Craig, Interest to June 1, 1880, 13 years.	10 80
June 1	—J. Schleiffer, Interest to June 1, 1880, 13 years.	7 94
June 1	—W. F. Anderson, Interest to June 1, 1880, 13 years.	17 50
June 1	—Geo. McAllister, Interest to June 1, 1880, 13 years.	18 50
June 1	—S. Bishop,	11 00

	Interest to June 1, 1880, 13 years.		
			40,095 85
1867.			
June	1—Martin Clark, Interest to June 1, 1880, 13 years.	92 73	
June	1—George Clark, Interest to June 1, 1880, 13 years.	63 00	
June	1—S. S. Mann, Interest to June 1, 1880, 13 years.	116 20	
June	1—H. Frank & Co,, Interest to June 1, 1880, 13 years.	24 00	
June	1—Mrs. S. C. Pickett, Interest to June 1, 1880, 13 years.	20 00	
June	1—C. E. Needles, Interest to June 1, 1880, 13 years.	8 00	
June	1—E. Whitman & Sons, Interest to June 1, 1880, 13 years.	10 00	
June	1—J. H. Walzl, Interest to June 1, 1880, 13 years.	39 22	
June	1—McDowell, Robinson & Co., Interest to June 1, 1880, 13 years.	156 50	
June	1—John T. Watkins, Interest to June 1, 1880, 13 years.	14 00	
June	1—Hild & Mitchell, Interest to June 1, 1880, 13 years.	17 69	
June	1—R. Sinclair & Co., Interest to June 1, 1880, 13 years.	33 90	
June	1—Boerman & Littlebaum, Interest to June 1, 1880, 13 years.	39 27	
June	1—Weiglein & Heilner, Interest to June 1, 1880, 13 years.	11 82	

June	1—Walter S. Moore & Co., Interest to June 1, 1880, 13 years.	26 76	
June	1—J. W. Ebert & Co., Interest to June 1, 1880, 13 years.	7 00	
June	1—Thos. D. Johnston, Interest to June 1, 1880, 13 years.	1,274 41	
			42,050 35
		42,050 35	
1867.			
June	1—Bolton Brothers, Interest to June 1, 1880, 13 years.	17 50	
June	1—David Anderson, Interest to June 1, 1880, 13 years.	67 75	
June	1—W. H. Oler, Interest to June 1, 1880, 13 years.	19 15	
June	1—Kelly & Piet, Interest to June 1, 1880, 13 years.	2,222 47	
June	1—"Evening Transcript," Interest to June 1, 1880, 13 years.	116 00	
June	1—Montgomery, Slade & Co., Interest to June 1, 1880, 13 years.	6 00	
June	1—Edward Sinn, Interest to June 1, 1880, 13 years.	3 50	
June	1—P. P. Pendleton, Interest to June 1, 1880, 13 years.	106 50	
June	1—J. A. Pierce, Interest to June 1, 1880, 13 years.	155 55	
June	1—D. Claude, Interest to June 1, 1880, 13 years.	25 00	
June	1—W. H. Glancote, Interest to June 1, 1880, 13 years.	36 25	
June	1—Hild, Wammelle & Mitchell,	4 45	

	Interest to June 1, 1880, 13 years.		
June	1—R. H. Tall,	4 00	
	Interest to June 1, 1880, 13 years.		
June	1—James T. Ball,	15 00	
	Interest to June 1, 1880, 13 years.		
June	1—John Nugent,	75 69	
	Interest to June 1, 1880, 13 years.		
	A. S. Abell & Co., Balt. Sun,	21 42	
	Interest to June 1, 1880, 13 years.		
June	1—Ammidon, Cranbie & Co.,	16 26	
	Interest to June 1, 1880, 13 years.		
		———	44,962 84
1867.			
June	1—G. C. Taliaferro,	75 00	
	Interest to June 1, 1880, 13 years.		
June	1—C. M. Davis,	71 66	
	Interest to June 1, 1880, 13 years.		
June	1—C. Yeugling,	314 85	
	Interest to June 1, 1880, 13 years.		
June	1—Thos. Dobbins,	75 00	
	Interest to June 1, 1880, 13 years.		
June	1—W. H. Gordon,	12 50	
	Interest to June 1, 1880, 13 years.		
June	1—R. A. Crawley,	165 00	
	Interest to June 1,1880, 13 years.		
June	1—Edward L. Clark,	56 22	
	Interest to June 1, 1880, 13 years.		
June	1—A. N. Stewart,	120 50	
	Interest to June 1, 1880, 13 years.		
June	1—Thos. H. Cook,	149 50	
	Interest to June 1, 1880, 13 years.		
June	1—Benj. P. Grymes,	60 00	

	Interest to June 1, 1880, 13 years.		
June 1	—W. L. Keller,	141 97	
	Interest to June 1, 1880, 13 years.		
1867.			
June 1	—Geo. Walters,	95 00	
	Interest to June 1, 1880, 13 years.		
June 1	—A. J. Smith,	120 00	
	Interest to June 1, 1880, 13 years.		
June 1	—H. Heth,	373 66	
	Interest to June 1, 1880, 13 years.		
June 1	—W. D. Miller,	1,136 24	
	Interest to June 1, 1880, 13 years.		
			47,929 94
	Interest on $47,929.94 being the aggregate amount of claims on page 9 to page 26, inclusive, from June 1, 1867, to June 1, 1880, 13 years,	37,385 35	
			85,314 29
	Aggregate for principal and interest, from page 8, bro't forward,		319,166 72
	Aggregate principal and interest, class 1, brought forward,		104,911 40
1880.			
June 1	—Grand total to date,		$509,392 41

Statement No. 2,

Showing No. shares stock held in Nat'l Ex. & Trans'n Co., par value per share, aggregate par val. of s'd stock, where same is held, &c.

Where Held.	Par Value.	No of Shares.
New York,	$100 00	12,032
Baltimore,	"	4,044
Washington, D. C.,	"	1,815
Georgetown, "	"	945

Where Held.	Par Value.	No. of Shares.
Richmond,	$100 00	2,349
Staunton,	"	1,494
Charlottesville,	"	1,585
Lynchburg,	"	2,329
Norfolk,	"	230
Fredericksburg,	"	527
Virginia (miscellaneous),	"	276
Charlotte, N. C.,	"	287
North Carolina (miscellaneous),	"	365
Augusta, Georgia,	"	2,618
Atlanta, "	"	1,210
Macon, "	"	1,430
Savannah, "	"	290
Rome "	"	216
Montgomery, Ala.,	"	520
Mobile, Ala.,	"	142
New Orleans, La.,	"	1,863
St. Louis, Mo.,	"	3,270
Miscellaneous places,	"	207
Total No. shares,	"	40,044

Then 40,044 shares would make the par value of all the company's stock	$4,004,400 00
From which deduct 20 per cent. already paid in or lost,	800,880 00
Leaving par val., of unpaid stock to which creditors look,	3,203,520 00

The aggregate of debts, as shown by acc't No. 1, is $509,392.41, which will require an assessment of about 20 per cent. on $3,203,520, the value of unpaid stock as above reported, after making an extremely moderate allowance for insolvent stockholders. Indeed, I feel very sure that the sequel will show it to be insufficient.

O. G. KEAN, Comm'r.

DEPOSITIONS RETURNED WITH COMMISSIONER'S REPORT:

Glenn's Adm'r
vs.
National Express and Transportation Company.

Comm'r's Office, Nov. 8th, 1879.

Depositions of M. B. Poitiaux and others taken before me, O.

G. Kean, a commissioner in chancery for the chancery court of Richmond, to be read as evidence on inquiries directed by decree of said court pronounced October 6, 1879, in a certain cause depending before it under the short style of "John W. Wright, sheriff, and as such adm'r of W. W. Glenn, deceased v. The National Express and Transportation Company."

Present—John Howard, Esq., p. q.

No counsel present for def'ts.

M. B. Poitiaux, a witness of lawful age, having been first duly sworn, deposeth and saith as follows:

1st quest. by the commissioner. What is the purport of the papers now filed by you marked "M. B. P. No. 1" and "M. B. P. No. 2," and "J. P. McC."?

Answer. They show that the National Express and Transportation Company is indebted to me in two sums—viz.: $300 for my services as cashier of the 1st division of said company for 3 months, and also $27.25 for money expended by me for the company. Both sums bear interest from Jan. 31st, 1867. The paper "J. P. McC." shows that there is due to Joseph P. McCorkle $250, with int. from Jan. 15, 1867, for his services as auditing clerk of the company. The paper "M. B. P. No. 2" is receipted at the bottom, but I never received the money.

Major Briscoe G. Baldwin was superintendent of the co. and told McCorkle and myself to make up our accounts and receipt them and he would pay them out of some money of the co. he expected to receive. We accordingly did so, and I find in my private papers receipts signed by us for part of the amounts named in "M. B. P. No. 1" and "J. P. McC," but the money was never paid us and the receipts were never delivered. These receipts I now file with the exhibits respectively so as to show the whole transaction.

These certificates were made out by me from my books and pay-rolls as cashier of the first division. By the direction of the authorities in Baltimore, I gave similar certificates to each employee of the company, in my division, to whom anything was due. These books and pay-rolls went out of my possession after the suspension of the company. I know that the amounts shown by the papers "M. B. P. No. 1," "M. B. No. 2," and "J. P. McC," are still due.

2d question by John Howard, Esq., p, q. How long were you cashier of the National Express and Transportation Company?

Answer. About seven or eight months; and I was in office when

the company suspended. I was appointed cashier by B. F. Ficklin, the general superintendent of the company.

3d question by same. Have you ever resigned or been removed?

Answer. I never resigned, nor was I ever removed.

4th question by same. Where was your office?

Answer. All the time I was cashier of the division my office was in Richmond.

5th by same. Did you transact at the Richmond office of the said company all the business devolved on you as cashier?

Answer. I was cashier of that division, and was complimented on the way I discharged my duties. I did all the business of the division which was assigned to me, and did it at the Richmond office. My division, the first, comprised Virginia, North Carolina, a part of South Carolina, and Bristol, Tennessee. I was only cashier in that division.

6th by same. Do you know of any visible property of any kind, in this State or elsewhere, belonging to the said company?

Answer. I do not now; nor do I know what became of the property it had; except some few old trash papers and blank forms, which I sold for some $27 or $30. These matters are very old, and as I am examined my memory is partly refreshed. I think I must have paid for the articles charged in the paper "M. B. P., No. 2," with that money, and I therefore withdraw that account as evidencing a debt due me. I never collected the other money due me, because I paid out what money was in my hands to drivers and other employees, relying for my own money on Major Baldwin as I have said, and since he failed to pay me, I have known no way of making the money.

7th question by same. State whether or not General Joseph R. Anderson, of this city, was a director of said company?

Answer. I always understood and believed him to be such.

And further this deponent saith not.

M. B. POITIAUX.

J. E. Brister, a witness of lawful *of lawful* age having been first duly sworn, deposeth and saith as follows:

1st quest. by John Howard, Esq., p. q. What is your occupation?

Answer. I am a printer at the office of the "Richmond Whig."

2nd by same. Look at the printed slip now shown you, marked "Richmond Whig," and say what it is?

Answer. It is an exact printed copy of a "local report" which appeared in the "Richmond Whig" of Wednesday morning, Oct. 31st, 1866. The "Richmond Whig" is a newspaper published then and now in the city of Richmond.

[The witness here produced before the commissioner an original file of the "Richmond Whig" for the year 1866; and upon examination of the same by the commissioner, the printed exhibit "Richmond Whig" above filed, was found to be a correct copy of the same.

O. G. KEAN, Com'r.]

I am a practical printer, and printed the slip I have filed. It is an accurate copy.

And further this deponent saith not.

JNO. E. BRISTER.

General Joseph R. Anderson, a witness of lawful age, having been first duly sworn, deposeth and saith as follows:

1st quest. by John Howard, Esq., p. q. What is your residence and occupation?

Answer. Richmond; President of the Tredegar Company.

2nd by same. Please look at the file of the "Richmond Whig," now shown you, and particularly at the number of Oct. 31st, 1866, and read the report therein made of meetings of the stockholders of the National Express and Transportation Company, held at the Exchange Hotel, in the city of Richmond, Monday evening, Oct. 29th, 1866, and on the following day (a printed copy of which has been filed and proved in this cause) and say whether or not you are the person referred to in said report?

Answer. I have no doubt I am.

3rd by same. Were you present and did you take part in said meetings of the stockholders?

Answer. That is my recollection.

4th by same. What assets has the National Express and Transportation Company, in this state or elsewhere, so far as you know?

Answer. None that I know of.

5th by same. Do you mean visible property?

Answer. I know of no visible property.

6th by same. Have the stockholders of said company, to your knowledge, had any meeting since those above referred to?

Answer. I recollect none.

7th by same. Please look at the printed circular, now shown you, dated Oct. 20th, 1866, and signed "Joseph R. Anderson, chairman," now filed, marked "J. R. A.," and say whether the signature thereto is yours?

Answer. I have no doubt it is.

And further this deponent saith not.

JOSEPH R. ANDERSON.

No other witness appearing, the further taking of these depositions is adjourned to the 18th day of November, 1879, at the same place and hour.

O. G. KEAN, Com'r.

Richmond, Nov'r 18th, 1879.

Pursuant to the foregoing adjournment, the further taking of these depositions was resumed and continued as follows:

Present—John Howard, Esq., for compl'ts.

No other counsel.

John T. Snowden, having been duly sworn, deposes and says as follows:

1st question by John Howard, Esq. State your name, age, residence and occupation?

Answer. John Thomas Snowden; I am 56 years of age, reside in Baltimore, Maryland, and am at present one of the deputy clerks of the superior court of Baltimore.

2nd by same. What was your residence and what your occupation in the years 1865 and 1866?

Answer. My residence was Baltimore city, as at present. My occupation then was that of a clerk in the auditor's department of the Baltimore and Ohio Railroad Company. My business was to audit the accounts in said department. I don't know that I audited all, but I audited many of the accounts—many of the accounts of agents on the line of the road. We had at various points on the road what may be termed sub agencies, offices located for the convenient transmission and receipt of freight, &c.; and it was the duty of all the sub-agents, controlling these offices, to make reports from time to time of their receipts and shipments to the principal office in Baltimore. There they were examined, and if correct, audited and entered in proper books kept for the purpose. Whenever any agent made a shipment of goods, he sent along with them a "manifest," showing the amount of freight. If the freight were paid at his office, he would be chargeable with the amount if it was to be collected at the point of destination, then the agent at that point would be responsible. In this way the several agents were made to operate, to some extent, as checks on each other. The auditor's office of the Baltimore and Ohio Railroad was in the city of Baltimore, and is the principal office of that road for the adjustment of its accounts.

3rd by same. State whether or not in the year 1866, say from March to October inclusive, the defendant, The National Express and Transportation Company, had its express matter transported by

the Baltimore and Ohio Railroad Company on the lines of its road?

Answer. It did.

4th by same. Were, or not, the accounts for such shipments or transportation kept and adjusted at the said principal office of the Baltimore and Ohio Railroad in Baltimore?

Answer. They were kept at the auditor's office of said railroad in the city of Baltimore.

5th by same. Please look at page 182 of the book now shown you, purporting to be a book of entries of the Baltimore and Ohio Railroad Company, and say what the book is, and particularly what appears on said page?

Answer. This book is one of the ledgers kept in the auditor's office of the Baltimore and Ohio Railroad Company, containing accounts against its agents and others for indebtedness for transportation of freight. It was given to me in the auditor's department of said road yesterday to bring here to-day. On page 182, in this book, appears the account of the National Express and Transportation Company.

6th. by same. In whose handwriting do the said entries of that account appear to be?

Answer. They are mine, and they were made by me, as are all the entries in said book in regard to the National Express and Transportation Company.

7th by same. Were they, or not, made in the ordinary and regular course of business?

Answer. They were made in the regular course of business.

8th by same. Please examine a paper, now shown you, purporting to be a copy of that account, marked "B. & O. R. R.," and to be filed as a part of your deposition, and state whether or not it is a correct copy of said account?

Answer. I have compared said paper with the account on the ledger, with the aid of the commissioner, and now state that it is an exact copy of said account, except that the account on the books does not contain the interest calculations appearing on the paper "B. & O. R. R."

9th by same. What is the balance due the Baltimore & Ohio R. R. Co. from the National Express and Transportation Co. by the account on the ledger you have referred to?

Answer. Forty-one thousand four hundred and thirty-two dollars and thirty-eight cents ($41,432.38).

10th by same. Is that, or not, the correct amount due, with interest to the present time?

Answer. I believe that to be the correct amount due.

11th by same. State whether or not the said account, as it appears on the ledger, was duly rendered to the National Express and Transportation Company, about the date of the last entry?

Answer. Yes, sir; it was so rendered. I have no hesitation in saying it was, and to my knowledge it was never objected to or disputed. I was in the office of the Baltimore & Ohio Railroad Company up to September, 1867, and know that the railroad company made great efforts to collect this debt, and never heard any reason for its failure to do so except that the debtor had no money.

And further this deponent saith not.

J. THOMAS SNOWDEN.

The further taking of these depositions is adjourned, to be continued on Monday, Dec. 15th, 1879, at the same place and at the hour of 11 o'clock A. M.

O. G. KEAN, Com'r.

Richmond, Dec. 15th, 1879.

Met pursuant to adjournment.

Present—John Howard, Esq., for complainant.

No other counsel.

Edward Price, having been duly sworn, deposes and says as follows:

1st question by John Howard, Esq. What is your name, age, residence and occupation?

Answer. Edward Price; I am 40 years of age, reside in Baltimore, and am the first book-keeper in the Bank of Commerce in that city. I have been connected with that bank eleven years next February.

2nd by same. State whether or not the defendant, the National Express and Transportation Company, kept a bank account with that bank; and if so, during what years?

Answer. The company had an account with the bank; I can't say when it commenced; but it ran down, according to the balance on the ledger of the bank, which I now have before me, to January 24, 1867. From that balance it is evident, from the rules and customs of the bank, that on that day the account was balanced and vouchers delivered.

3rd by same. What rules and custom do you refer to?

Answer. Whenever we balance a bank book and return the vouchers for same to customer, we close the account by drawing red lines across the face of the account, and bringing the balance down at that date. And the fact of the red lines being drawn

across the face of the account, as is the case with the account now before me, is proof that the balance was accepted and the vouchers delivered to the proper party.

4th by same. Do you see any previous similar balances on the said ledger of said bank of the account of said company with the bank? If so, please state them?

Answer. Yes; there is a balance of the account on July 2, 1866, of $3,509.77 in favor of the company; August 13, 1866, of $35,840.78 in favor of the bank; August 30, 1866, $19,001.71 in favor of the bank; September 17, 1866, of $12,030.15 in favor of the bank; January 24, 1867, a balance of $6,726.07 in favor of the bank, which is the last one appearing on the account. This balance has never been paid and is still due the bank.

5th by same. Look at the paper marked "B. C. B." filed with the commissioner, and state what you know about the notes and acceptance therein described?

Answer. The ledger of the bank, now before me, shows that each of the notes and acceptances mentioned in paper "B. C. B." were protected for non-payment, and charged against The National Express and Transportation Company, and credits were to that account—that is, the bank account of said company is credited with all payments made. These credits are stated in paper "B. C. B." on the account due the bank.

6th by same. The amount due the back according to paper "B. C. B." due by average July 4th, 1868, appears to be $17,479.60. Is that the correct amount due?

Answer. It is, with interest from July 4th, 1868.

7th by same. Do you know what disposition the bank made of the notes and acceptances above mentioned?

Answer. They were placed in the hands of Wallis & Thomas, attorneys at law, for collection, on the 24th January, 1867, whose receipts for the same the bank still holds, and is now before me. I don't know whether suit was brought on them or not; but do know that the National Express and Transportation Company has received credit on its account for every dollar that has been collected from these notes and acceptances.

8th by same. What is the character and standing of Messrs. Wallis & Thomas?

Answer. They are very prominent members of the Baltimore bar; and in all respects for integrity, character, capacity and promptitude stand as well as any men in Baltimore.

And further this deponent saith not.

EDWARD PRICE.

Clapham Murray, having been duly sworn, deposes and says as follows:

1st question by John Howard, Esq. State your name, age, residence and occupation?

Answer. Clapham Murray; I am forty-one years of age; reside in Baltimore, and I am assistant cashier in the "city collector's office."

2nd by same. State whether or not you have ever been in the employment of the Bank of Commerce, of the city of Baltimore; and if so, in what capacity and during what time?

Answer. I have been in the employment of said bank. I was appointed discount clerk of said bank September 1st, 1865. I remained with that bank, as well as I remember, about five years, during about 14 or 15 months of which time I was its cashier.

3rd by same. Look at the paper now shown you, marked "B. C. B." purporting to contain, among other things, a memorandum of certain notes discounted by the Bank of Commerce of Baltimore for the National Express & Transportation Company, and say whether the same is correct, and whether said notes were in fact discounted by said bank for said company?

Answer. I have looked at the paper referred to, and with the aid of the first book-keeper of the said bank, and in the presence of the commissioner, have carefully compared it with the books of original entries of the bank. The said paper is a correct copy of those books. The notes therein mentioned were discounted by the bank for the National Express and Transportation Company, and are still unpaid, so far as I know. I was the discount clerk of the bank during the period covered by these transactions, and either kept or supervised the books wherein the original entries were made These books are now before me, and I know the entries to be correct. All notes and other paper discounted by the bank passed through my hands, and were examined by me—these among others. There are credits noted on paper "B. C. B.," showing payments on account of the notes above referred to and the other indebtedness. They are doubtless correct, but I know nothing about them. I have examined the receipt book of the bank, which is now before me, and by comparison with the paper "B. C. B.," find that the notes and acceptances mentioned in that paper were delivered to Messrs. Willis & Thomas, attorneys and counsellors at law, of Baltimore, for collection.

And further this deponent saith not.

CLAPHAM MURRAY.

The further taking of these depositions is adjourned, to be continued on Tuesday, Dec'r 16th, 1879, at the same place and hour.

O. G. KEAN, Com'r.

Richmond, Dec. 16, 1879.

Met pursuant to adjournment.

Present: John Howard, Esq., for compl't.

No other counsel.

Enoch Pratt, having been duly sworn, deposes and says as follows:

1st question by John Howard, Esq. State your name age, residence, and occupation?

Answer. Enoch Pratt; I am seventy-one years of age, reside in Baltimore, and I am a merchant—a bank president—and vice-president of the Philadelphia, Wilmington & Baltimore railroad, in which I am also a director. I have been vice-president of said road about ten or twelve years, and a director in it for about twenty-five years.

2nd by same. Please look at the account marked "P. W. B.," to be filed with your deposition as part thereof, bearing date September 18, 1868, and state whether or not the said account is correct?

Answer. Yes; it is a correct account of the acceptances mentioned and described in the petition of the Philadelphia, Wilmington and Baltimore R. R., filed in this case, and correctly represents the indebtedness of the National Express and Transportation Company to the said railroad company. I append to said account notices of the protest of said acceptances, and have carefully and diligently searched among the papers of the railroad company for the acceptances themselves without success. If found, they shall be at once forwarded to the commissioner.

3rd by same. Who was H. F. Kenney, mentioned in the said notices of protest?

Answer. He was the superintendent of the Philadelphia, Wilmington & Baltimore Ralroad Company.

4th by same. Who was Richard F. Allison, referred to in said notices?

Answer. He was styled the cashier of the National Express and Transportation Company at Baltimore.

5th by same. What was the consideration for said acceptances?

Answer. The transportation of express matter over the line of the Philadelphia, Wilmington & Baltimore R. R. for the National Express and Transportation Company, and charges thereon; the whole amount due for which is represented by the acceptances already referred to.

6th by same. Who was the S. P. Wilbank, mentioned in the notices of protest above referred to?

Answer. He was a party in the employ of the express company.

I don't know what his position was, but am satisfied he was authorized to draw the drafts, as otherwise they would not have been accepted. We generally had weekly settlements with the National Express and Transportation Company, and the acceptances in question were given in settlement of the accounts growing up from week to week. These accounts on September 18, 1868, aggregated the sum of $7,736.74, which, with interest from that date on $6,921.25, the principal of said sum, is the amount still due and unpaid from the National Express & Transportation Company to the Philadelphia, Wilmington & Baltimore Railroad Company.

And further this deponent saith not.

ENOCH PRATT,
Vice-Pres't Phila., Wil. & Balti. R. R. Co.

The further taking of these depositions is adjourned to be continued April, 26, 1880.

OTHO G. KEAN, Com'r.

Com'rs Office, April 26, 1880.

Depositions were continued pursuant to adjournment as follows:

Present. John Howard, Esq., p. q.

John J. Kelly, a witness of lawful age deposeth and saith as follows, having been first duly sworn:

1st quest. by Mr. Howard, p. q. What is your residence and occupation?

Answer. I am a manufacturer of straw goods and reside in New York city.

2nd by same. Where did you reside in 1866?

Answer. Part of the time in Richmond, part of the time in Baltimore.

3rd by same. State what connection you had, if any, with the deft., the National Express & Transportation Co., during that time, and what opportunities you had of knowing its business and the officers and agents who conducted it?

Answer. I was first general auditor of the Co., subsequently a director and vice-president, and for the remainder of my term with them general superintendent. In all of these capacities I was familiar with the affairs of the Co. and with its officers and agents, books and accounts.

4th by same. Where have you subsequently resided?

Answer. In the city of New York.

5th by same. State about what time the Co. failed and ceased its operations?

Answer. I think the active operations of the Co. were closed up in November or December of 1866. Its various offices were closed as rapidly after that as possible.

6th by same. What connection, if any, did you have with the assets of the Co., after its failure, and in what capacity; and what action did you take in the matter, if any?

Answer. I was one of three trustees, to whom the Co., by a deed of trust dated Sept. 20th, 1866, (and mentioned in the papers of the case) assigned its affairs. The deed was not delivered to us, according to its provisions, until some time later, when we took charge of the affairs of the Co. My co-trustees were John Blair Hoge and C. Oliver O'Donnell, then both of Baltimore. Mr. O'Donnell has since died, but he never took any active part in the matter. Mr. Hoge is now in W. Va. I was the most active in the matter, but consulted Mr. Hoge. We met from the start with difficulties in the way of attachment suits and otherwise, and even before the deed of trust became operative, by recording it at the various points necessary, the larger part of the personalty of the Co., in fact all its personalty, was seized in such suits, and never came into our possession. We made efforts everywhere to realize the personal property of the company, but without the slightest sort of success. We were met with serious law proceedings in Maryland, where the affairs of the company were taken out of our hands and put in those of a receiver, and by a suit in New York, by which we were enjoined from doing anything further in the matter. The trustees have been without funds either to prosecute or defend these litigations, and the trust has consequently been permitted to lie without action. It should be added, however, that the trustees did defend the proceedings in Maryland, and the receiver there was removed, and the affairs of the Co. returned to our hands.

7th by same. What part, if any, of the assessments, made by the company upon the stockholders before it failed, were collected by you and your co-trustees; and what effort did you make to collect them?

Answer. I have no recollection of any collection on account of assessments on stock. All our efforts were delayed, as previously stated, and finally stopped by the injunction proceeding in New York.

8th by same. State whether or not the Co. received any notes from stockholders on account of said assessments; and if so, what became of them?

Answer. I think there were notes and obligations from Ficklin used as collateral to raise money on at some time during the existence of the Co. The Co. sometimes drew on various stockholders

for amount of their assessments and deposited the drafts with its endorsement, as collateral for loans, or sent them through the bank for collection. In every case the Co. was the debtor, so far as the bank was concerned. This was particularly the case towards the close of the operations of the Co., when drafts for a large part of their last assessment were made upon the stockholders, and those drafts used to obtain money from the Bank of Commerce, with which the drafts were deposited.

9th by same. State, if you know, whether or not, a great many of the stockholders of the Co. have become insolvent?

Answer. I only know one or two instances, in my own knowledge, in New York city. I am informed that very many of them have become insolvent.

10th by same. What percentage of assessment had been made when the Co. ceased business?

Answer. In all, twenty per cent.

11th by same. What became of the books and papers of the Co., on its failure, and in whose custody and where have they been since?

Answer. The books and papers came into the possession of the trustees in Baltimore, were taken from them by the order of a local court in Maryland and placed in the hands of Thomas G. Pratt, as receiver, and subsequently, after his receivership had been vacated, they came into my possession, and I have had them in the city of New York ever since.

12th by same. Have you any of those books here present; and if so, state what they are, and so describe them as that they can be identified; and state also, if you know, in whose handwriting they severally are?

Answer. I have some of the books here, having brought them from New York at the call of counsel for the plaintiff; and will leave them in the commissioner's possession, that he may examine them thoroughly, and make such extracts as may be necessary, with the understanding, however, that when they have been so examined and extracts made, they are to be returned to me in New York. I do not feel authorized to surrender them absolutely.

They are as follows:

1. "Stock ledger A. N. E. T. Co." It contains an account with each individual holder of stock; showing date of certif. from and to whom transferred, number of the transfer, number of the certificate, number of shares and requisitions (or assessments) drawn. It is in the handwriting of the treasurer of the Co., Mr. J. V. H. Allen. I know his handwriting personally and know that he was treasurer.

2. "Subscriptions National Express Co.," containing a list of the stockholders of the Co., classified under the names of the places in

which the subscriptions were made or the stock held. Showing the name of each stockholder at said place, the number of shares held, the amount paid, the amount due, and the votes to which he was entitled.

It is partly in the handwriting of the treasurer, Mr. Allen, and partly in that of the transfer clerk, his assistant. His name was Robt. Mayo, I think. I know his handwriting.

3. "Record N. E. & T. Co. Board of Directors," containing a record of the meeting and proceedings of the stockholders and directors.

It is in the handwriting of the various secretaries of the Co., or secretaries *pro tem.*—J. V. H. Allen, P. T. Moore, and others.

On page 153–4 is a memorandum in my own handwriting, which shows on its face that it is not a minute of any official proceedings, but only an abstract of proceedings, showing succession of officers, &c.

The page 152 closes the record of the last meeting of the directions of the Co. I know both signatures to be genuine. "J. V. H. Allen, secretary," "M. G. Harman, vice-president."

4. "Trial balance sheet," containing the trial balances of the general ledger from time to time. Semi-monthly to monthly trial balances, the last being dated Oct. 8th, 1866. It shows the condition of the Co., so far as written into its books, up to that date. It is in the handwriting of the accountant of the Co., A. B. Johnston.

13th by same. State whether or not you have any books, papers or other memoranda which will enable you or anyone to show what was the actual indebtedness of the Co. at the time it ceased operations, and to whom severally this indebtedness was due?

Answer. I have no such books, papers or memoranda. Nothing in the possession of the trustees or Co. would make a complete statement. Many claims were never presented to the trustees or to the Co. in any shape which has been preserved.

The Co. continued to contract debts with the railroad, its employees and others after October, when the books stopped, and the last balance was shown.

I may have in New York books which will give more information above the indebtedness of the Co. than the trial balance of the general ledger. If so I will send them on to the com'r to be returned to me with the other books, as above stated. I know that I have the journal corresponding with the ledger, from which the trial balances were taken. I will describe such books as are sent in a letter addressed to the com'r, which I ask him to accept and file as part of this deposition.

14th by same. Have you any claim of your own against the Co. for services or otherwise? If so, please state it?

Answer. I have a claim against the Co., for services as general

supt., and disbursements for travelling expenses, &c., in the service of the Co., amounting March 1st, 1867, to $2,383.47—none of which has been paid. I will enclose an account of it, verified by affidavit, (showing how much of it appears on the books of the Co., and how much accrued after the books were closed) to Com'r Kean as part of my deposition.

15th by same. Do you know anything of a claim of H. Warfield against the Co.?

Answer. I know he has a considerable claim against the Co., arising out of a compromise between them. The Co. gave him notes, the consideration of which was a surrender of stock on his part. I see in the hands of the counsel for Warfield, four notes dated Aug. 10, 1866, due at 3, 6, 9 and 12 mos., for $750 each, signed with the genuine signature of Jos. E. Johnston, President. I see also a certified copy of the minutes authorizing this settlement, with the genuine attestation of J. V. H. Allen, Secretary. The above papers are here filed with this deposition.

And further this deponent saith not.

JOHN J. KELLY.

Adjourned to meet again May 7th, 1880.

O. G. KEAN, Com'r.

Richmond, May 7th, 1880.

L. R. Smoot, having been duly sworn, deposes and says as follows:

1st question by Jno. Howard, Esq. State your name, residence and occupation?

Answer. Luther R. Smoot; I reside in Baltimore, Maryland, and am now secretary of a gas light company in that city.

2d by same. State what connection you had, if any, with The National Express and Transportation Company; at what time and for how long you were so connected with it; and what opportunities, if any, you have had for knowing the business and indebtedness of said company?

Answer. I took a position with that company as assistant to the general superintendent on March 8th, 1866, and remained until August 10th, of the same year. After the appointment of the receiver, Thomas G. Pratt, formerly Governor of Maryland, by the circuit court of Baltimore, at the suit of W. W. Glenn and others, I was appointed by said receiver with the approval of the court, to take charge of all the books and papers and retain the custody of the same until they were transferred under a decision of the court

of appeals of Maryland, to the trustees of the company, viz: John J. Kelly, C. Oliver O'Donnell and John Blair Hoge. It was, I think, from about December, 1866, to July, 1867, that the books remained in my custody. I was directed by the receiver to procure and examine all claims against the company previously filed with the trustees, and all others received at the receiver office. I performed that duty and submitted the claims, properly authenticated, to the circuit court of Baltimore, together — lists of the said claims by states; copies of which lists I now file with the commissioner, numbered respectively 1, 2, 3, 4, 5, 6, 7, 8, 9, as part of my deposition. I filed the original claims in the circuit court of Baltimore as being the established debts against the Express Company, aggregating a total indebtedness of $107,464.49— I mean so far as such claims were presented before the receiver. Under an order of court the receiver made a call for all persons holding claims to produce them before him on or before May 1, 1867. Many persons did not, however, bring in their claims. All the papers in said suit in Baltimore have been lost. Many persons presented their claims, through counsel, to the court, generally demands on written contracts.

3rd by same. Do you know what counsel, if any, represented the Bank of Commerce in that suit?

Answer. S. Teakle Wallis, in his individual capacity, or his firm, Wallis & Thomas, I don't know which. I know that I furnished Mr. Wallis some information from the books of the company. The account of the said bank was in part secured by notes given by stockholders of the company for assessments. It could not be made up for a long time, as many of these notes had not matured.

4th by same. Do you personally know of any other claims against said company which are just?

Answer. I do; I know of those appearing on the list which I now file with the commissioner, marked No. 10, all of which are justly — to the persons named in said list; being mostly due to the employees of the Baltimore office. And in addition the company owes me a separate debt of $770, principal, being my pay for the entire period of service from March 8th to Aug. 10th, 1866. I now file the evidence of said claim, marked No. 11 & 12. I also file herewith, as No. 13, a memorandum, two items of which I now desire to prove, viz.: that of H. Heth, for $373.66, and that of W. D Miller, for $1.136.24. I also desire to file with my deposition a paper marked No. 14, the same being a memorandum of some of the claims against the company made about June 12th, 1876. I made the said memorandum, and am satisfied of its correctness: and I will remark that I see from it that the Bank of Commerce was represented by S. T. Wallis. I also file as No. 15, a piece of the scrip of said company. It bears date Jan'y 25,

1866, and shows the way in which assessments on stock were paid and to be paid.

5th by same. Please look at the books now shown you, being those referred to in the deposition of John J. Kelly, and left with the commissioner, and say whether you recognize them as part of the books formerly in your custody?

Answer. I do. I, however, had charge of many besides these.

And further this deponent saith not.

L. R. SMOOT.

STATE OF VIRGINIA—*City of Richmond, to-wit:*

I, Otho G. Kean, a comm'r in chancery for the chancery court of Richmond, do certify that the foregoing depositions were duly taken, sworn to and subscribed before me at the time and place named therein.

Given under my hand, this 19th day of June, 1880.

OTHO G. KEAN, Comm'r.

EXHIBIT "RICHMOND WHIG," WITH DEP'N OF J. E. BRISTER, PAGE 119.

National Express & Transportation Company.

A meeting of the stockholders of this company was held on Monday evening at the Exchange Hotel. On motion, Mr. Peachy R. Grattan was called to the chair.

Mr. Kelly, from the committee appointed to confer with the Merchants' Union Express Company, New York, made a report of the result of said negotiation, and read a communication showing that the proposition to that company to purchase the preferred stock of the National Express and Transportation company was not acceded to.

Gen. Anderson moved that a committee of five be appointed to report a plan for the reorganization of the company; said report to be presented at a meeting to be held the following morning.

The chairman appointed the following committee: Lewis V. Bogy, of St. Louis; John B. Miner, of Charlottesville; Thomas J. Michie, of Staunton; M. G. Harman, of Staunton; and Gen. Joseph R. Anderson, of Richmond.

Mr. Bogy moved that Wm. H. Perot, of Baltimore, be telegraphed to, and asked whether he would accept the presidency of the company. This motion was adopted unanimously. Mr. Bogy spoke very highly of Mr. Perot, as a gentleman of high reputation, large means, and anxious for the success of the company. Mr. Bogy suggested $2,500 as the salary, but, at the same time,

remarked that he knew Mr. Perot, if he accepted the office, would not care much about the amount of salary.

On motion of Gen. Anderson, the meeting adjourned to next morning at 11 o'clock.

Adjourned Meeting.

The stockholders reassembled yesterday morning, and the committee appointed by the previous meeting made an elaborate report, through its chairman, Mr. Bogy, on the subject of reorganization. From this report we find that

557	shares had been taken, on which nothing has been paid.						
1,154	shares on which 1 per cent. has been paid and no certificate issued.						
2,169	shares on which	5	per cent.	have	been	paid.	
20	"	"	7½	"	"	"	"
8,087	"	"	10	"	"	"	"
25	"	"	11	"	"	"	"
20	"	"	12½	"	"	"	"
250	"	"	13	"	"	"	"
12,554	"	"	15	"	"	"	"
20	"	"	15½	"	"	"	"
15,188	"	"	20	"	"	"	"

40,044 total amount of shares.

The company has collected from its stockholders in cash,	$534,748
From the same parties, in notes, which are considered good,	54,436
	$589,184
Indebtedness of every description,	273,000
	$862,184

Assets.

The company has, in wagons, horses, harness, books, stationery, safes and office fixtures, the sum of	$235,120 81
In bills receivable as above mentioned,	54,436 00
Total,	$289,556 81
Thus leaving a loss of	$572,627 19

There is due the company by stockholders as delinquents—and this based only on the 36,440 shares of the stock on which 10 per cent and upwards has been paid—the sum of $145,855 will pay up

the stock to 20 per cent., and the report proposes that an additional call of 10 per cent. be made, based on these 36,440 shares, which would give the sum of $361,440.

The cash means would then be:

Already due,	$145,855
Proposed call of 10 per cent. on 36,440 shares,	361,440
Total,	507,295
Which, added to the amount of assets on hand, would make a total of	$796,851 81

The report goes on to say that if the stockholders pay up as proposed in it, the condition of the company will be as follows:

Amount due on previous calls,	$145,855
Amount for proposed calls,	361,440
	$507,295
Less the debts,	273,000
	$234,295

Leaving the sum of $234,295 on hand, besides the property, to carry on the business, which the company say they deem ample, provided the administration of affairs of the company be able and economical. (This is but a brief abstract of the report, which is quite lengthy.)

The following resolutions, drawn up by the committee, were then read:

Resolved, That this meeting sees nothing in the present condition or future prospects of this company to induce despair of the ultimate success of our enterprise.

2. That, with a fund of subscribed stock, yet untouched, in the hands of solvent shareholders, amounting to upwards of $3,000,000, of which less than one-tenth will discharge all our liabilities, and less than one-fifth will enable the company to proceed prosperously with its operations, insolvency is absurd, and failure to succeed wholly unnecessary.

3. That to pay the debts, and resuscitate the credit of the company is the first duty and purpose of the stockholders, to which end every shareholder is already pledged and bound by law to the full extent of the stock owned or subscribed by him.

4. That this meeting being satisfied that thirty per cent. of the stock at present subscribed will suffice to pay the debts and prose-

cute the business of the company successfully, would now, if it possessed the legal power, reduce and consolidate the stock by reducing the number of shares to three-tenths of the original amount; but that being impracticable without an amendment of the charter, the stockholders here present pledge themselves, and hereby instruct the president and directors to endeavor to obtain such amendment from the General Assembly of Virginia as soon as it shall again be convened in December next.

5. That in addition to the requisitions heretofore made, amounting in the aggregate to twenty per cent., the president and directors be instructed forthwith to make a further requisition of ten per cent. upon the stockholders—five per cent. payable within thirty days, and five per cent. within ninety days—and that they proceed, without delay, to enforce payment from all delinquents by the promptest and surest process of law.

6. That the president and directors be advised to suspend the active operations of the company, taking due care of all its property until the stockholders shall have responded to the requisitions upon them as to supply a fund sufficient to pay the debts and extend the business without further embarrassment.

7. That the creditors have in the obligation, willingness and ability of the stockholders to pay with honorable promptitude the debts respectively due, the amplest security therefor. They are respectfully appealed to to forbear such proceedings as can only tend to delay, embarrass and injure the company, without, in any wise, hastening that result of the speedy liquidation which the stockholders desire and aim at not less earnestly than themselves.

8. That the stockholders now present address themselves with confidence to their fellow-stockholders urgently, but most respectfully, reminding them that they cannot, and ought not, to seek to evade responsibility for the debts already incurred, and that in justice to all concerned, the commercial enterprise on which we entered, so needful as it is to the business of the country, and of which we esteem the future success already assured, cannot be abandoned without eminent discredit. They therefore trust that each stockholder, for his own sake, and for the sake of the company, will respond promptly and fully to the calls made upon him.

9. That the president and directors be specially instructed to cause the interests and rights of the company, now in litigation in Alexandria, Baltimore and New York, or elsewhere, to be diligently cared for and protected.

10. That as soon as the debts of the company shall be paid, or satisfactorily arranged, the business shall be gradually resumed, as fast and as far as circumstances shall allow, and, at all events, in season for spring trade.

11. That the president and directors be requested to apply to the general assembly of Virginia as soon as it shall convene, in Decem-

ber next, for an amendment to the charter, reducing the capital of the company to a minimum of $1,000,000, with power to increase it to $2,000,000, and limiting the liability of the stockholders upon their raising subscriptions to forty per cent. thereof.

12. That it shall be an invariable rule, from which the president, directors and superintendents are specially charged, to allow no departure; that all the employees of this company, who receive or disburse money, shall execute and file with the secretary, before entering upon their offices, bonds in adequate penalties, and with sufficient security, to be renewed from time to time, as occasion requires, for the faithful discharge of their duties.

13. That the utmost energy and promptness on the part of all officers and employees of the company, with a pervading spirit of economy, are deemed necessary to success; and therefore we recommend to the board great vigilance in this regard.

General Anderson then offered the following resolution, which was adopted:

Resolved, That the report of the committee be adopted, with the following modifications, viz: Whereas, this meeting is fully satisfied that the payment of thirty per cent., as indicated in the report, is sufficient to carry on the business of the company, yet, as a matter of precaution, this meeting recommend, that when consolidation is effected by amendment to the present charter, it be based on forty per cent., and entire release of the remaining sixty per cent.; this additional ten per cent. to be called or not, as the exigencies of the company may arise, and not to be called on unless the same be necessary.

On motion of Mr. Michie, it was

Resolved, That the president of the company is hereby instructed to lay before the Hon. J. C. Underwood, judge of the eastern district of Virginia, the proceedings of this meeting.

The stockholders then proceeded to make nominations for a board of directors, when the following gentlemen were nominated and unanimously approved of:

W. H. Perot, Baltimore.
E. J. Foley, Baltimore.
Wm. Devrics, Baltimore.
Joseph R. Anderson, Richmond.
Wm. H. Webb, New York.
J. Carter Marbury, Washington.

R. P. Zimmerman, Atlanta.
M. G. Harman, Staunton.
Lerenzo Norvell, Lynchburg.

On motion of Gen. Imboden, it was

Resolved, That the report of the committee and proceedings be published in the city papers, and that the secretary have five hundred copies published in pamphlet form, and send one to each stockholder without delay.

The meeting then adjourned *sine die*.

In the course of the proceedings, reference was made more than once to the secretary, Mr. J. V. H. Allen, and to the general superintendent, Mr. John J. Kelly (formerly of Wells, Fargo & Co.'s Express), in terms highly complimentary for their efficiency, and the ready and satisfactory manner in which they answered all questions put to them in connection with their departments, and it appeared to be the universal wish of the meeting that they should be continued in office.

Examined and found correct.

O. G. KEAN, Comm'r.

EXHIBIT "M. B. P., No. 1," WITH DEP'N M. B. POITAUX, PAGE 116.

Office Nat. Express & Trans. Co.,
Richmond, Va., January 31st, 1867.

To the Trustees of the Nat. Express & Trans. Co, Baltimore:

Gentlemen: I would hereby inform you that there is due by this company to myself the sum of three hundred dollars for my services, as cashier 1st division N. E. and T. Co., from 1st November, 1866, to date, at $100 per month.

Yours respectfully,

M. B. POITIAUX,
Cashier 1st Div. N. E. & T. Co.

Richmond, Va., Nov. 30th, 1866.

Received of the National Express and Transportation Company,

one hundred dollars, in full for services as cashier 1st division, from 1st Nov'r to 30th Nov'r, for the month of November, 1866.

$100.

M. B. POITIAUX.

[U. S. Inter. Rev. Stamp, 2 cts.]

EXHIBIT "M. B. P., No. 2," WITH DEP'N M. B. POITIAUX.

The National Express and Trans. Co.,
To M. B. Poitiaux, cashier, &c., Dr.

For following amounts paid by him during the months of November and December, 1866, for petty expenses in his office at Richmond, Va., viz:

For 2 loads of anthracite coal,	$20 00
For freight on sundry packages reports, &c., received by express, $1, $1.25, 25c., 25c., 50c., and 25c.,	3 50
For 30 2c. revenue stamps,	60
For 60 3c. postage stamps,	1 80
For putting away coal in office,	25
For repairing lock to front door,	50
For matches for office,	10
For hauling cashier's books and papers from office,	50
Total,	$27 25

[U. S. Inter. Rev. Stamp, 2c.]

Received payment in full.

M. B. POITIAUX.

☞ Withdrawn by Mr. Poitiaux.

EXHIBIT "J. P. McC.," WITH DEP'N OF M. B. POITIAUX.

Office Nat. Express and Trans Co.,
Richmond, Va., January 15th, 1867.

To the Trustees of the Nat. Express and Trans. Co., Baltimore:

Gentlemen,—I would hereby inform you that there is due by this company to Mr. Joseph P. McCorkle the sum of two hundred

and fifty dollars for his services as auditing clerk 1st division N. E. & T. Co. from 1st Nov'r, 1866, to date, at $100 per month.

Yours respectfully,

M. B. POITIAUX,
Cashier 1st Div. N. E. & T. Co.

Richmond, Nov. 30th, 1866.

Received of the National Express and Transportation Company one hundred dollars in full for services as clerk in auditing department from 1st Nov. to 30th Nov., for month of November, 1866.

J. P. McCORKLE.

$100.

[U. S. Inter. Rev. Stamp, 2 cts.]

EXHIBIT "J. R. A.," WITH DEP'N OF JOS. R. ANDERSON, PAGE 120.

Richmond, Va., October 20, 1866.

To Messrs.

of :

Gentlemen,—At the general meeting of stockholders held in pursuance of a call of the Board of Directors of the National Express and Transportation Company, in this city, on the 9th instant, a business committee consisting of Messrs. Barber, of Georgia; Bogy, of St. Louis; Nixon, of New Orleans; Norvell, of Lynchburg; Crichton and Perot, of Baltimore, and Skiddy, of New York, was raised to make a thorough investigation into the affairs of the company and recommend such action on the part of the stockholders as in their judgment would promote the interests of the best company. After a most searching and laborious examination of the condition and prospects of the company, the committee submitted an elaborate report, which was unanimously received and approved by the meeting, in which they recommend that to extricate the company from its present embarrassments, restore its credit, and ensure its success, the present subscribed stock of about four millions of dollars should be consolidated and reduced to one-fourth of its nominal amount, and that upon the payment by any stockholder of the aggregate sum of $25 on each share of his stock and the surrender of his scrip, "full paid stock," not liable to further calls and assessments, shall be issued to him in the proportion of one share of "full paid" for four shares of the present stock. This consolidation will reduce the present stock of the company to about one million of dollars "full paid"—will produce money enough to relieve the company of all its indebtedness,

and leave it in possession of all its valuable property, with a considerable sum of ready money in its treasury to prosecute its business.

The charter of the company fixes its capital at five millions, with power to increase it to ten millions, but requires one-third of the five millions to be actually subscribed.

Now, as the proposed consolidation of stock will reduce the capital stock below the required one-third, it is recommended to issue not less than six thousand shares of preferred eight per cent. stock, to be sold at par. As stated, these recommendations were unanimously approved by the meeting; and a committee was appointed to go to New York and negotiate a sale there of as much of this preferred stock as practicable. Mr. Barber, the chairman, and several members of the committee have returned, and at an adjourned meeting of stockholders, held at the Exchange Hotel in this city last evening, made a favorable report of their progress in the object of their mission to New York. Whereupon the stockholders agreed to adjourn their meeting till Monday, the 29th instant, at the same place. And in view of the fact that the whole of the preferred stock may not be taken in New York, it was

"*Resolved*, That a committee of three stockholders be appointed by the chairman of this meeting, in each town and city where the stock of the company is held, to solicit subscriptions to the preferred stock, and report to the adjourned meeting."

By virtue of this resolution, you are hereby appointed a committee for ——— ———, and earnestly requested to obtain subscribers to the preferred stock, and report their names and amount of subscriptions obtained, previous to the meeting, to me, on or before the 29th instant, in order that the same may be laid before the meeting of stockholders at that time; and then continue your efforts as long as successful.

I respectfully suggest the following form of subscription to the preferred stock, and a certificate to be signed by you as a committee.

I am, very respectfully, your ob't servant,

JOSEPH R. ANDERSON,
Chairman.

SUBSCRIPTION TO PREFERRED STOCK OF THE NATIONAL EXPRESS & TRANSPORTATION COMPANY.

It being proposed to consolidate the present stock of the National Express & Transportation Company, at not over 25 per cent.

of its par value, and issue not less than six thousand shares of preferred 8 per cent. stock of said company, we, the undersigned, do agree and bind ourselves, our heirs, &c., to subscribe for and take the number of shares of such preferred stock opposite our respective names, and pay for the same in such sums or instalments as may be required by said company, till the full amount of one hundred dollars per share is paid up. But this subscription is not to be valid and binding till at least six thousand shares of such stock are subscribed for by parties solvent and able to pay, nor unless the consolidation of the present stock is effected.

Witness our hands and seals, this —— day of ———, 1866.

Name of Subscribers.	No of Shares.	Amount.
[Seal.]		$

We, the undersigned committee, do certify that we have procured the foregoing subscriptions, and know the subscribers, and believe them able to comply with the terms of their subscription.

} Committee.

Exhibit B. & O. R. R. with

Dr. The National Express Company in account

Date.	Account of.						Items.	Amount.
1866.								
March 31.	To tonnage for			March,	1866,	M. S.,	$4,596 50	
" "	" "	" "	"	"	"	N. W. Va.,	678 85	
" "	" "	" "	"	"	"	W. B.,	3,405 17	
								$8,680 52
April 30.	" "	" "	"	April,	"	M. S.,	4,338 90	
" "	" "	" "	"	"	"	N. W. Va.,	825 46	
" "	" "	" "	"	"	"	W. B.,	1,847 21	
								7,011 57
May 31.	" "	" "	"	May,	"	M. S.,	6,756 50	
" "	" "	" "	"	"	"	N. W. Va.,	1,770 68	
" "	" "	" "	"	"	"	W. B.,	1,802 70	
								10,329 88
June 30.	" "	" "	"	June,	"	M. S.,	9,767 25	
" "	" "	" "	"	"	"	N. W. Va.,	2,994 45	
" "	" "	" "	"	"	"	W. B.,	2,053 92	
								14,815 62
July 31.	" "	" "	"	July,	"	M. S.,	12,784 72	
" "	" "	" "	"	"	"	N. W. Va.,		
" "	" "	" "	"	"	"	W. B.,	2,064 01	
								14,848 73
Aug. 31.	" "	" "	"	August,	"	M. S.,	12,219 12	
" "	" "	" "	"	"	"	W. B.,	2,151 14	
" "	" "	" "	"	May, June & July,	"	W. & P.,	1,952 31	
								16,322 57
Sept. 30.	" "	" "	"	September,	"	M. S.,	9,955 25	
" "	" "	" "	"	"	"	W. B.,	1,940 18	
								11,895 43
Oct. 31.	" "	" "	"	October,	"	M. S.,	3 25	
" "	" "	" "	"	"	"	W. B.,	50 00	
								53 25
								$83,957 57

1866.							
	To balance brought forward,						41,432 38
Jan. 1, 1867.	" int. 173 d's from July 12, '66, on	$41,290.63	above bal. reduc. by cr.				1,190 54
1868.	" " 365 " "	Jan. 1, '67,	"	42,481.17			2,584 27
1869.	" " 366 " "	"	'68,	"	45,065.44		2,584 27
1870.	" " 365 " "	"	'69,	"	47,814.43		2,908 71
1871.	" " 365 " "	"	'70,	"	50,723.14		3,085 66
1872.	" " 365 " "	"	'71,	"	53,808.80		3,273 37
1873.	" " 366 " "	"	'72,	"	57,082.17		3,482 01
1874.	" " 365 " "	"	'73,	"	60,564.18		3,684 32
1875.	" " 365 " "	"	'74,	"	64,248.50		3,908 45
1876.	" " 356 " "	"	'75,	"	68,156.95		4,146 21
							$72,444 91

1876.		
Jan'y 1.	To balance brought forward,	$72,303 16

Deposition of J. T. Snowden.

with the Baltimore and Ohio Railroad Co. Cr.

Date.	Account of.	Items.	Amount.
1866.			
March 20.	By cash March, M. S.,		$1,546 46
" 31.	" " W. B.,	$1,128 00	
" "	" " M. S.,	1,344 53	
" "	" " N. W. Va.,	203 02	
			2,675 55
May 17.	" " and vouchers on acc.,	1,025 00	
" "	" "	7,500 00	
			8,525 00
June 12.	" "	7,558 19	
" "	" " W. B.,	781 28	
			8,339 47
" 20.	" "		4,933 59
July 11.	" " draft paid,		2,500 00
" 17.	" "		5,000 00
Aug. 25.	" "	3,522 01	
" "	" " W. B.,	657 80	
			4,179 81
Sept. 10.	" "	4,038 78	
" "	" "	784 46	
" "	" " error being difference in acc. as rend.,	2 07	
			4,825 31
" "	" " balance per acc. rendered,		41,432 38
			$83,957 57
1866.			
July 12.	By int. 20 days, 6 per cent. per annum allowed on $42,525 19, paid as per cr's above shown, in advance, on average June, 22, 1866, the average date of dr's above being July 12, 1866,		141 75
1876.			
Jan'y 1.	Balance carried forward,		72,303 16
			$72,444 91

EXHIBIT "B. C. B.," FILED WITH DEP'N OF ED. PRICE.

National Express & Transportation Co.,
In account with Bank of Commerce, Baltimore.

1867.			
Jan'y 24	To balance of ledger account with interest to date as per statement rendered,		$6,726 07
	To the following notes and acceptances discounted for them at sundry times, viz.:		
"	C. L. Stemnon's note, dated June 27th, 1866, 90 d., endorsed J. E. Johnston & J. V. H. Allen, Treas.,	507 65	
	Protest,	2 28	
	Interest to date,	10 03	
			519 96
	Dis. Aug. 25, '66. Dom. O. B.		
"	W. P. Moore's note, dated July 1st, '66, 90 d., endorsed by John J. Kelly, V. Pres't,	400 00	
	Protest,	2 00	
	Interest to date,	7 64	
			409 64
	Dis. Aug. 25, '66. Foreign O. Bk.		
"	John B. Minor's note, dated Aug'st 25, '66, endorsed by J. S. Davis & J. V. H. Allen, Tr.,	251 87	
	Protest,	2 25	
	Interest to date,	4 49	
			258 61
	Dis. Sept. 15, '66. F. O. B.		
"	Michael Cunningham's note, dated Aug. 4, '66, 120 d., endorsed by John O'Conner & J. V. H. Allen, Treas.,	255 12	
	Protest,	3 25	

	Interest to date,	2 15	
			260 52
	Dis. Aug. 15, '66. F. O. B.		
	For'd,		8,174 80
1867.			
	Amount brought forward,		8,174 80
Jan'y 24—	T. G. Barrett's note, dated Aug. 5th, 1866, 120 d., endorsed by Barrett, Carter & Co., and J. V. H. Allen, Tr.,	253 88	
	Protest,	3 25	
	Interest to date,	2 10	
			259 23
	Dis. Aug. 15, '66. F. O. B.		
"	Barrett, Carter & Co., note dated Aug. 5th, '66, 120 d., endorsed by T. G. Barrett & J. V. H. Allen, Tr.,	507 75	
	Protest,	3 25	
	Interest to date,	4 17	
			515 17
	Dis. Aug. 15th, '66. F. O. B.		
"	Joseph Hatton's note, dated Aug. 6, '66, 120 d., endorsed by S. B. Simmons & J. V. H. Allen, Tr.,	225 12	
	Protest,	3 25	
	Interest to date,	2 06	
			260 43
	Dis. Aug. 15th, '66. F. O. B.		
"	S. B. Simmons's note, dated Aug. 6, '66, 120 d., endorsed by Jos. Hatton & J. V. H. Allen, Tr.,	255 12	
	Protest,	3 25	
	Interest to date,	2 06	
			260 43
	Dis. Aug. 15th, '66. F. O. B.		
"	John Fox's note, dated Aug. 6, '66, 120 d., endorsed by Jos. Hatton & J. V. H. Al-		

	len, Tr.,	51 03	
	Protest,	3 25	
	Interest to date,	43	
			54 71
	Dis. Aug. 15, '66. F. O. B.		
			$9,524 77
"	G. P. Curry's note, dated Aug. 9th, '66, 120 d., endorsed by R. F. Curry and J. V. H. Allen, Tr.,	1,020 50	
	Protest,	3 25	
	Interest to date,	7 68	
			1,031 43
	Dis. Aug. 15th, '66. F. O. B.		
"	W. A. Burke's acceptance, dated Aug. 10th, '66, 4 mos., endorsed M. G. Harman, Hugh W. Sheffey and J. V. H. Allen, Treas'r,	50 00	
	Protest,	2 20	
	Interest to date,	36	
			52 56
	Dis. Aug. 15th, '66. F. O. B.		
"	J. V. H. Allen's dft. on Wm. Allen, dated Aug. 10, '66, 4 mos., endorsed M. G. Harman, Hugh W. Sheffey and J. V. H. Allen, Tr.,	50 00	
	Protest,	2 20	
	Interest to date,	36	
			52 56
	Dis. Aug. 15th, '66. F. O. B.		
"	Jed. Hotchkiss' acceptance, dated Aug. 10th, '66, 4 mos., endorsed M. G. Harman, Hugh W. Sheffey and J. V. H. Allen, Tr.,	125 00	
	Protest,	2 20	
	Interest to date,	89	
			128 09
	Dis. Aug. 15th, '66. F. O. B.		
"	W. H. Farris' acceptance, dated Aug. 10th, '66, 4 mos.,		

	endorsed M. G. Harman, Hugh W. Sheffey and J. V. H. Allen, Tr.,	125 00	
	Protest,	2 20	
	Interest to date,	89	
			128 09
	Dis. Aug 15th, '66. F. O. B.		
	Forward,		10,917 50
	Amount brought for'd,		10,917 50
1867.			
Jan'y 24	—J. S. Byer's acceptance, dated Aug. 10th, '66, 4 mos., endorsed M. G. Harman, Hugh W. Sheffey and J. V. H. Allen, Tr.,	250 00	
	Protest,	2 20	
	Interest to date,	1 76	
			253 96
	Dis. Aug. 15th, '66. F. O. B.		
"	Wm. Frazier's acceptance, dated Aug. 10th, '66, 4 mos., endorsed M. G. Harman, Hugh Sheffey and J. V. H. Allen, Tr.,	250 00	
	Protest,	2 20	
	Interest to date,	1 76	
			253 96
	Dis. Aug. 15th, '66. F. O. B.		
"	J. M. McCue's acceptance, dated Aug 10th, '66, 4 mos., endorsed M. G. Harman, Hugh W. Sheffey and J. V. H. Allen, Treas.,	250 00	
	Protest,	2 20	
	Interest to date,	1 76	
			253 96
	Dis. Aug. 15th, '66. F. O. B.		
"	E. W. Bayly's acceptance, dated Aug. 10th, '66, 4 mos., endorsed M. G. Harman, Hugh W. Sheffey and J. V. H. Allen, Tr.,	250 00	

	Protest,	2 20	
	Interest to date,	1 76	
			253 96
	Dis. Aug. 15th, '66. F. O. B.		
"	B. B. Donnaghi's acceptance, dated Aug. 10th, '66, 4 mos., endorsed M. G. Harman, Hugh W. Sheffey and J. V. H. Allen, Treas.,	250 00	
	Protest,	2 20	
	Interest to date,	1 76	
			253 96
	Dis. Aug. 15th, '66. F. O. B.		
			12,187 30
1867.			
	Amount brought for'd,		12,187 30
Jan'y 24—	Thos. J. Michie's acceptance, dated Aug. 10th, '66, 4 mos., endorsed M. G. Harman, Hugh W. Sheffey, and J. V. H. Allen, Treas.,	250 00	
	Protest,	2 20	
	Interest to date,	1 76	
			253 96
	Dis. Aug. 15th, '66. F. O. B.		
	Wm. M. Laughlin's acceptance, dated Aug. 10, '66, 4 mos., endorsed M. G. Harman, Hugh W. Sheffey, and J. V. H. Allen, Treas'r,	500 00	
	Protest.	2 20	
	Interest to date,	3 51	
			505 71
	Dis. Aug. 15th, '66. F. O. B.		
"	Robt. J. Glendy's acceptance, dated Aug. 10th, '66, 4 mos., endorsed M. G. Harman, Huge W. Sheffey, and J. V. H. Allen, Tr.,	500 00	
	Protest,	2 20	
	Interest to date,	3 51	
			505 71
	Dis. Aug. 15th, '66. F. O. B.		

"	J. J. A. Trotter's acceptaace, dated Aug. 10th, '66, 4 mos., endorsed M. G. Harman, Hugh W. Sheffey, and J. V. H. Allen, Tr.,	1,050 00	
	Protest,	2 20	
	Interest to date,	7 36	
			1,059 56
	Dis. Aug. 15th, '66. F. O. B.		
	Forward,		14,512 24
1867.			
	Amount brought forward,		14,512 24
Jan'y 24—	Wm. H. Farris' acceptance, dated Aug. 10th, '66, 4 mos., endorsed M. G. Harman, Hugh W. Sheffey, and J. V. H. Allen, Treas.,	1,125 00	
	Protest,	2 20	
	Interest to date,	7 89	
			1,135 09
	Dis. Aug. 25th, '66. F. O. B.		
"	J. M. Barton's note, dated Aug. 17th, '66, 4 mos., endorsed J. V. H. Allen, Treas'r,	255 00	
	Protest,	1 98	
	Interest to date,	1 50	
			258 48
	Dis. Aug. 25th, '66. F. O. B.		
"	H. J. Rogers' note, dated Aug. 17th, '66, 4 mos., endorsed J. V. H. Allen, Treas.,	255 00	
	Protest,	1 98	
	Interest to date,	1 50	
			258 48
	Dis. Aug. 25th, '66. F. O. B.		
"	W. W. Gilmer's note, dated Aug. 25th, '66, 120 d., endorsed Jno. W. Godwin and J. V. H. Allen, Tr.,	102 00	
	Protest,	2 25	
	Interest to date,	50	
			104 75
	Dis. Sept. 15th, '66. F. O. B.		

	J. M. Godwin's note, dated Aug. 25th, '66, 120 d., endorsed W. W. Gilmer and J. V. H. Allen, Tr.,	127 50	
	Protest,	2 25	
	Interest to date,	63	
			130 38
	Dis. Sep. 15th, '66. F. O. B.		
			16,399 42
1867.			
	Amount brought forward,		16,399 42
Jan. 24	—J. Minor's note, dated Aug. 25, '66, 120 d., endorsed Dabney Minor & J. V. H. Allen, Tr.,	127 50	
	Protest,	2 25	
	Interest to date,	63	
			130 38
	Dis. Aug. 25, '66. F. O. B.		
	J. R. Wood's note, dated Aug. 25, '66, 120 d., endorsed M. G. Harman, Vice-Pres't,	1,010 00	
	Protest,	2 14	
	Interest to date,	4 89	
			1,017 03
	Dis. Aug. 25, '66. F. O. B.		
	Wm. C. Butler's note, dated Aug. 25, '66, 4 mos., endorsed Thos. F. Wingfield, Jr., and J. V. H. Allen, Tr.,	50 75	
	Protest,	2 25	
	Interest to date,	24	
			53 24
	Dis. Sept. 15, '66. F. O. B.		
"	Horace W. Jones, dated Aug. 25, '66, 4 mos., endorsed Jas. D. Jones and J. V. H. Allen, Tr.,	51 03	
	Protest,	2 25	
	Interest to date,	24	
	Dis. Sept. 15, '66. F. O. B.		

"	Wm. A. Watson's note, dated Aug. 25, '66, 4 mos., endorsed Wm. A. Watson & J. V. H. Allen, Tr.,	102 00	
	Protest,	2 13	
	Interest to date,	47	
			104 60
	Dis. Sep 15. F. O. B.		
	Forward,		17,758 19
1867.			
	Amount brought forward,		17,758 19
Jan. 24—	A. Benson's note, dated Aug. 25, '66, 4 mos., endorsed H. Benson & J. V. H. Allen, Tr.,	102 00	
	Protest,	2 25	
	Interest to date,	47	
			104 72
	Dis. Aug. 25, '66. F. O. B.		
"	Dabney Minor's note, dated Aug. 25, '66, 4 mos., endorsed J. Minor & J. V. H. Allen, Tr.,	127 50	
	Protest,	2 25	
	Interest to date,	59	
			130 34
	Dis. Aug. 25, '66. F. O. B.		
"	John Dooley's note, dated (Aug.) July 25, '66, 5 mos., endorsed J. V H. Allen, Tr.,	127 50	
	Protest,	1 98	
	Interest to date,	58	
			130 06
	Dis. Aug. 25, '66. F. O. B.		
"	G. T. Jones' note, dated Aug. 25, '66, 4 mos., endorsed R. K. Flannagan & J. V. H. Allen, Tr.,	255 00	
	Protest,	2 25	
	Interest to date,	1 16	
			258 41
	Dis. Sept. 15, '66. F. O. B.		

"	R. K. Flannagan's note, dated Aug. 25, '66, 4 mos., endorsed G. T. Jones & J. V. H. Allen, Tr.,	255 00	
	Protest,	2 25	
	Interest to date	1 16	
			258 41
	Dis. Sept. 15, '66. F. O. B.		
	Forward,		18,640 13
1867.			
	Amount brought forward,		18,640 13
Jan. 24—	E. S. Hutter's note, dated Aug. 27, '66, 4 mos., endorsed J. R. Hutter & J. V. H. Allen, Tr.,	387 60	
	Protest,	2 08	
	Interest to date,	1 76	
			391 44
	Dis. Aug. 25, '66. F. O. B.		
"	B. C. Flannagan's note, dated Aug. 25, '66, 4 mos., endorsed B. C. Flannagan & J. V. H. Allen, Tr.,	510 00	
	Protest,	2 13	
	Interest to date,	2 30	
			514 43
	Dis. Sept. 15, '66. F. O. B.		
"	J. W. Lipop's note, dated Aug. 25, '66, 4 mos., endorsed S. M. Keller & J. V. H. Allen, Tr.,	510 00	
	Protest,	2 25	
	Interest to date,	2 30	
			514 55
	Dis. Sept. 15, '66. F. O. B.		
"	Wm. Daniel, Jr., note dated Aug. 25, '66, 4 mos., endorsed J. V. H. Allen, Tr.,	2,550 00	
	Protest,	1 98	
	Interest to date,	11 48	
			2,563 46
	Dis. Aug. 25, '66. F. O. B.		

"	J. D. Imboden's note, dated Aug. 25, '66, 4 mos., endorsed J. V. H. Allen, Treas.,	3,570 00	
	Protest,	2 28	
	Interest to date,	16 07	
			3,588 35
	Dis. Sept. 15, '66. F. O. B.		
	Forward,		$26,212 36
1867.			
	Amount brought forward,		26,212 36
Jan. 24—	Thos. Opie's acceptance, dated Aug. 10, '66, 4 mos., endorsed M. G. Harman and J. V. Allen, Tr.,	300 00	
	Protest,	2 28	
	Interest to date,	2 11	
			304 39
	Dis. Aug. 15, '66 F. O. B.		
			$26,516 75

Credits.

1867.			
Feb'y 5—	By cash,	$ 304 98	
Nov. 1—	" do.,	1,000 00	
" 26—	" do.,	145 92	
1868.			
Jan. 13—	" do.,	823 81	
June 30—	" do.,	4,227 47	
Aug. 18—	" do.,	284 97	
Sept. 21—	" do.,	414 09	
Octo. 23—	" do.,	109 38	
1869.			
Ap'l 16—	" do.,	59 28	
July 8—	" do.,	62 87	
Aug. 23—	" do.,	1,428 28	
1871.			
July 13—	" do.,	121 33	
Sept. 2—	" do.,	54 69	
			9,037 07
			$17,479 68

Due by average, July 4, 1868.
Interest from that date.

EXHIBIT "P. W. B." WITH DEP'N OF ENOCH PRATT.

Philadelphia, Sept. 18th, 1868.

National Express and Transportation Co.,
To Philadelphia, Wilmington & Balto. R. R. Co.

For amount due as per protested drafts as follows:

1866.			
Sept. 14—1 day's sight,	$1,901 60		
Protest,	2 28		
Interest, 2 years,	228 46		
		$2,132 34	
1866.			
Sept. 21—1 day's sight,	$1,643 20		
Protest,	2 31		
Interest 1 year, 11 months, 23 days,	195 53		
		1,841 04	
1866.			
Sept. 29—1 day's sight,	$1,597 60		
Protest,	2 33		
Interest 1 year, 11 months, 14 days,	187 73		
		1,787 66	
1866.			
Oct'r 13—1 day's sight,	$1,769 60		
Protest,	2 33		
Interest 1 year, 11 mos.,	203 77		
		1,975 70	
			$7,736 74

H. F. KENNY, Esq., Supt.:

Baltimore, Oct. 23rd, 1866.

Please take notice that S. P. Wiltbank's draft, dated Philadelphia, Oct. 13th, 1866, payable at one day's sight to the order of H. F. Kenny, Supt., for seventeen hundred and sixty-nine $\frac{60}{100}$ dollars, drawn on and accepted by Richard T. Allison, Esq., Cash., Baltimore, Md., due and by you endorsed, is delivered to me by the cashier of the National Farmers and Planters Bank of Baltimore for protest, and the same not being paid, payment therefor having been demanded and refused, is protested, and will be

returned to the said cashier, and that you are held liable for the payment thereof.

Yours, respectfully,

LEANDER WARREN, Notary Public,
No. 61 Second street (up stairs).

H. F. KENNY, Esq., Supt.:

Baltimore, Oct. 6th, 1866.

Please take notice that S. P. Wiltbank's draft, dated Philadelphia, Sept. 29th, 1866, payable at one day's sight to the order of H. F. Kenney, supt., for fifteen hundred and ninety-seven $\frac{60}{100}$ dollars, drawn on R. T. Allison, Esq., cashier Nat. Ex. & Trans. Co., Baltimore, Md. Due and by you endorsed, is delivered to me by the cashier of the National Farmers & Planters Bank of Baltimore, for protest, and the same not being paid, payment therefor have been demanded and refused, is protested, and will be returned to the said cashier, and that you are held liable for the payment thereof.

Yours respectfully,

LEANDER WARREN, Notary Public,
No. 61 Second street (up stairs).

H. F. KENNEY, Esq., Supt.:

Baltimore, Sept. 28th, 1866.

Please take notice that S. P. Wiltbanks' draft, dated Philadelphia, sept. 21st, 1866, payable at one day's sight to order of H. F. Kenny, supt., for sixteen hundred and forty-three $\frac{20}{100}$ dollars, drawn on R. F. Allison, Esq., cashier Nat'l Ex. & Trans. Co., Baltimore, Md., and by you endorsed, is delivered to me by the cashier of the Farmers and Planters Bank of Baltimore for protest, and the same not being paid, payment therefor having been demanded and refused, is protested, and will be returned to the said cashier, and that you are held liable for the payment thereof.

Yours respectfully,

LEANDER WARREN, Notary Public,
No. 61 Second street (up stairs).

H. F. KENNEY, Supt.:

Baltimore, Sept. 21, 1866.

Please take notice that S. P. Wiltbank's bill of exchange dated

Philadelphia, Sept. 14, 1866, payable at one day's sight to order of H. F. Kenney, supt., for nineteen hundred and one $\frac{60}{100}$ dollars, drawn on R. T. Allison, cash., Baltimore, Md., and by you endorsed, is delivered to me by the cashier of the Farmers and Planters Bank of Baltimore for protest, and the same not being paid, payment therefor having been demanded and refused, is protested, and will be returned to the said cashier, and that you are held liable for the payment thereof.

Yours respectfully,

LEANDER WARREN, Notary Public,
No. 61 Second street (up stairs).

EXHIBIT "W. C. V. M. & G. S. No. 1," RETURNED WITH COM'RS REPORT.

STATE OF VIRGINIA—*City of Richmond, to-wit:*

At a court of hustings held for the city of Richmond, at the court-house, on the 23d day of April, one thousand eight — and sixty-eight—

The Orange and Alexandria Railroad Company, Plt.,
against
The National Express and Transportation Company, Dft., } In case.

This day came the plaintiff by its attorney, and neither party requiring a jury, it is considered by the court that the plaintiff recover against the defendant three thousand one hundred and forty-four dollars and seventy cents, with interest thereon, to be computed after the rate of six per centum per annum, from the 1st day of December, 1866, till paid, and the plaintiff's costs in this behalf expended. Plaintiff's costs, $7.60.

In testimony that the foregoing is a true copy from the records of the said court, I, Andrew Jenkins, clerk of the hustings court of the said city, have hereunto set my hand and affixed the seal of the said court, this 13th day of May, 1876.

[Seal.] ANDREW JINKINS, Cl'k.

STATE OF VIRGINIA—*City of Richmond, to-wit:*

I, Alexander B. Guigon, judge of the hustings court of the city aforesaid, do hereby certify that Andrew Jenkins, whose name is

signed to the foregoing certificate, is now, and was at the time of signing the same, clerk of the hustings court of the city of Richmond, duly elected and qualified according to law; that his signature is genuine, and that all of his official acts are entitled to full faith and credit.

Given under my hand, at the city of Richmond, this 13th day of May, 1876.

A. B. GUIGON,
Judge of the hustings court of the city of Richmond.

STATE OF VIRGINIA—*City of Richmond, to wit:*

I, Andrew Jenkins, clerk of the hustings court of the city of Richmond, in the State aforesaid, do hereby certify that Alexander B. Guigon, whose name is signed to the foregoing certificate, is now, and was at the time of signing the same, judge of the hustings court of the city of Richmond, duly qualified according to law; that his signature is genuine, and that all of his official acts are entitled to full faith and credit.

Witness my hand, this 13th day of May, 1876.

ANDREW JINKINS, Clerk.

EXHIBIT "G. McM.," RETURNED WITH COM'RS REPORT.

Ohio county circuit court, May term, 1867:

George McMasters,
v.
The Nat'l Express and Trans'n Co., } In assumpsit.

This day came the parties by their attorneys, and thereupon came a jury, to wit: William Clohan, Robert Hamilton, Shep. Thomberg, Daniel Snyder, J. S. Jones, Albert Waite, William Holliday, Holston Harden, Benjamin F. Coleman, Hugh Sterling, John Webb and Barnard Higgins, who, being elected, tried and sworn to well and truly try the issue joined, and having heard the evidence and argument of counsel, upon their oath do say, "We, the jury, find for the plaintiff, and assess the damages at $1,385.96, with interest from first September, 1866. Wm. Clohan." Whereupon, it is considered by the court that the plaintiff recover against the defendant the damages assessed as aforesaid, with interest from 1st Sept., 1866, and his costs by him about his suit in this behalf expended.

COPY OF EXECUTION.

THE STATE OF WEST VIRGINIA,

To tthe Sheriff of Ohio County—Greeting:

We command you, that of the goods and chattels of The National Express and Transportation Company, late in your bailiwick, you cause to be made the sum of 1,385 dollars and 96 cents, with legal interest thereon from the first of September, 1866, till payment, which George McMasters, lately in our circuit court for the county of Ohio, has recovered against it, as well for his damages, which he sustained by reason of it, the said National Express and Transportation Company, not performing certain promises and assumptions to the said George McMasters by the said National Express and Transportation Company, lately made as for interest on those damages; also, the sum of 35 dollars and 61 cents, which to the said G. McMasters, in the same court, were adjudged for his costs in that suit expended, whereof the said company is convicted, as appears to us of record, and how you shall have executed this writ make known at the clerk's office of our said court at rules to be held therein on the last Tuesday in June, 1867, next. And have then there this writ.

Witness Michael J. Brienig, clerk of our said court, at the courthouse of our said county, in the city of Wheeling, this 31st day of May, 1867, and in the 4th year of the state of West Virginia.

MICHAEL J. BREINIG,
Clerk of the Circuit Court of Ohio county.

SHERIFF'S RETURN.

By virtue of these executions, received by me on May 31st, 1867, I levied upon the following property belonging to the National Express and Transportation—23 sets double harness, 23 sets single harness, 1 top wagon, 1 wagon without top, 2 parts of sets of single harness, 36 feet gum hose. I advertised the property enumerated above according to law, designating the time and place of sale, and sold same for cash to the following parties, they being the highest and best bidders, June 12, 1867.

To James McGannon,	1	set	single	harness,	$ 23 00
" Geo. McMasters,	5	"	"	"	130 00
" Robt. Higgins,	12	"	"	"	288 00
" Peter Denneger,	1	"	"	"	26 00
" Otto Hess,	1	"	"	"	29 00

" Thos. Ratcliff,	3	" " "	75 00
	23		$571 00
To Otto Hess,	1	sett double harness,	27 00
" Peter Denneger,	1	" " "	32 50
" Robt. Higgins,	11,		418 00
" Geo. McMasters,	8,		240 00
" Chandler,	1,		30 00
" Ridgely Jacob,	1,		28 50
	23		$1,347 00
To John Matle,	1	wagon,	121 00
" S. Horkeimer,	1	wagon,	140 00
	2		$1,608 00
To. S. Horkeimer,	1	pt. sett harness,	6 25
" Seller,	½	" "	6 50
			$1,620 75
To Geo. McMasters, 36 feet hose,			14 76
Total,			$1,635 51

After deducting costs, sixty-six ——— and thirty-six cents; sheriff's commissions, forty-one dollars and seventy cents; storage, &c., nine dollars and fifty cents; water tax, twenty-seven dollars, leaves a balance of fourteen hundred and ninety dollars and ninety-five cents, which I distributed *pro rata*, to wit: Robt. Higgins, eight hundred and thirty-six dollars and ninety-two cents; Geo. McMasters, six hundred and fifty-four dollars and three cents, June 12th, 1867.

WM. L. McPHAIL, D. S., for
THOS. J. CAMPBELL, S. O. C.

A copy.

Teste,

MICHAEL J. BREINIG, Clerk, &c.

STATE OF WEST VA.—*Ohio county, ss.*

I, E. H. Caldwell, judge of the first judicial circuit of the state aforesaid, do certify that Michael Breinig, who hath attested the

foregoing, is clerk of the circuit court of Ohio county and State aforesaid.

Given under my hand this 22d day of July, 1867.

E. H. CALDWELL.

Court costs of the within named suit,	$35 61
Commissions,	38 78
City water tax,	13 50
Storage for wagons, &c.,	4 50
	$92 39

Teste:

MICHAEL J. BREINIG, Clerk.

I, Geo. McMasters hereby agree to pay to Slinghoff & Slinghoff & S. S. Pleasants, attorneys-at-law, one-half of all they may collect of my claims against the National Express and Transportation Co. (being balance due on a judgment against said Express Co., amounting, *principal*, to $1,385.96, and costs, $35.61, with interest from Sept. 1, 1866, on which I have received the sum of $654.03, on June 12, 1867), said attorneys to hold me harmless from all costs and expenses of prosecuting said claims.

GEORGE McMASTERS.

Mannington, W. Va., April 9th, 1876.

EXHIBIT LOUIS STIX & CO.,

Returned with Com's Report.

Cincinnati, November 15th. 1866.

The National Express & Transportation Co.

To Louis Stix & Co., Dr.

For rent of building, 129 W. 3d st., $500 00

The same being balance due on lease and in full settlement.

Received payment.

Endorsed on back.

I certify that this expenditure was necessary to the proper conducting of the business of the company.

J. F. WINSLOW,
Supt. 3d division N. E. & T. Co.
and Managing Agent.

Cincinnati, April 7, 1876.

Pay the within claim to the order of Louis Stix & Co.

STATE OF OHIO—*Hamilton county, city of Cincinnati, ss.*

By this public instrument, be it remembered, that on the seventh day of April, one thousand eight hundred and seventy-six, before me, the subscriber, Victor Abraham, a notary public in and for the county and State aforesaid, appointed by the governor of the State of Ohio, to take proof and acknowledgment of deeds and other instruments to be used or recorded in the said State of Ohio, and to administer oaths and affirmations, take depositions, &c., personally appeared Nathan Stix, of the city of Cincinnati, Ohio, who, being by me duly sworn according to law, did depose and say: That he is a member of the firm of Louis Stix & Co., of the city of Cincinnati, State of Ohio, which said firm is composed of the following named persons, viz.: Louis Stix, Caroline Swartz, and affiant, that the foregoing claim, marked "A," is correctly made out from the books of the said Louis Stix & Co., that the said charges were made in said books at or about the time of their respective dates; that the claim for which said charges were made, as shown by said account, is for balance of rent of premises in the city of Cincinnati, rented by the firm of Louis Stix & Co., to the National Express & Transportation Co., a corporation; that the charges are correct and the said account just and true, as stated to the best of deponent's knowledge and belief; that the demand as shown by said account, is just, due and unpaid; that the same, or any part thereof, has not been paid or settled by the said corporation, The National Express & Transportation Co., nor by any person or persons for it, except as may be shown by said account "A"; that there is no just offset known to deponent against said demand; that all just and legal credits have been given to said account; that there is now due (as aforesaid) to deponent's said firm, from said corporation, The National Express & Transportation Co., the sum of five hundred dollars, as certified in said Exhibit A and approved by said corporation's agent, exclusive of any payment or setoff; that no usurious interest has been charged, and that lawful interest is due thereon from the 15th day of November, 1866, and that deponent's said firm does not hold any collateral or personal security, or satisfaction whatever to secure said debt, or any portion thereof.

NATHAN STIX.

Sworn to before me, and subscribed in my presence, the date aforesaid.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal the year, month and day first written.

[Seal.] VICTOR ABRAHAM,
Notary Public,
Hamilton county, Ohio.

16 Masonic Temple, corner Third & Walnut sts.,
Cincinnati, Ohio.

EXHIBIT WITH COM'R'S REPORT.

In Richmond Hustings Court Clerk's Office, September 20th, 1866—

John B. Baldwin, Pl't.,
against
The National Express and Transportation Company, D'f'ts., } In case.

This day came the plaintiff by his attorneys, and the defendants by J. D. Imboden, their attorney in fact, duly constituted by letter of attorney, and the said defendants, by their said attorney, acknowledged the plaintiff's action for two thousand dollars and the costs of suits. Whereupon, it is considered that the plaintiff recover against the defendants the said sum of two thousand dollars, with interest thereon, to be computed after the rate of six per centum per annum from this day until paid, and his costs by him in this behalf expended.

A copy—Teste:

ANDREW JINKINS, C'lk.

Plaintiff's costs, $—

Subject to the following credits: $775.17 and $251.18 of Dec'r 31st, 1866, and 132.34 of Jan'y 17, 1867.

Teste:

ALFRED SHEILD,
Cl'k Cir. Court City of Richmond.

EXHIBIT WITH COM'R'S REPORT.

In Richmond Hustings Court, Clerk's Office, September 20th, 1866—

J. D. Imboden, Pl't,
against
The National Express and Transportation Company, D'f't,
} In case.

This day came the plaintiff by his attorneys, and the defendants by L. H. Page and W. A. Maury, their attorneys in fact, duly constituted by letters of attorney, and the said defendants by their attorneys aforesaid acknowledged the plaintiff's action for fourteen hundred and fifty-six dollars and fifty-six cents and the costs of suit. Whereupon it is considered that the plaintiff recover against the defendants the said sum of fourteen hundred and fifty-six dollars and fifty-six cents, with interest thereon, to be computed after the rate of six per centum per annum from this day until paid, and his costs by him about his suit in this behalf expended.

A copy—Teste:

ANDREW JINKINS, Cl'k.

Pl't's costs, $———.

Subject to a credit of $565.09, and of $534.90, and $233.20.

Teste:

ALFRED SHEILD,
Cl'k Cir. C't City of Richmond.

EXHIBIT WITH COM'S REPORT.

In Richmond Hustings Court Clerk's Office,
September 20, 1866.

Legh R. Pagh and William A. Maury, partners in the practice of the law, under the style and firm of Page & Maury, Pl'ts,
against
The National Express and Transportation Company, Def'ts,
} In case.

This day came the plaintiffs by their attorneys, and the defendants by John D. Imboden, their attorney in fact, duly constituted by letter of attorney, and acknowledged the plaintiff's action for twenty four hundred dollars and the costs of suit. Whereupon it is considered that the plaintiff recover against the said defendant the said sum of twenty-four hundred dollars, with interest thereon, to be computed after the rate of six per centum per annum, from

this day until paid, and their costs by them about their suit in this behalf expended.

A copy—Teste:

ANDREW JINKINS, Cl'k.

Subject to the following credits: $929.79 and $300.69, of Dec. 31, 1866, and $158.83, of Jan'y, 17, 1867.

Teste:

ALFRED SHEILD,
Cl'k Circuit Ct. City of Richmond.

EXHIBIT WITH COM'R'S REPORT.

In Richmond Hustings Court clerk's office, September 20th, 1865:

Robert Ould and Isaac H. Carrington, partners in the practice of the law under the name and style of Ould & Carrington, Pl'ts,
against
The National Express and Transportation Company, D'f'ts. } In case.

This day came the plaintiffs by their attorneys, and the defendants by L. R. Page and W. A, Maury, their attorneys in fact, duly constituted by letters of attorney, and the said defendants by their attorneys aforesaid acknowledged the plaintiffs' action for two housand dollars and the costs of suit. Whereupon it is considered that the plaintiffs recover against the defendant the said sum of two thousand ——, with interest thereon, to be computed after the rate of six per centum per annum, from this day until paid, and their costs by them about their suit in this behalf expended.

A copy—Teste: ANDREW JINKINS, Cl'k.

Plaintiffs' costs, $———.

Subject to a credit of $775.17.

Teste:

ALFRED SHEILD,
Cl'k Cir. Ct. City of Richmond.

EXHIBITS WITH DEP'N OF L. R. SMOOT.

No. 1.

District of Columbia.

1. S. D. Childs, driver,	C	75	00
2. John Biddle, "	G	50	00
3. "National Intelligencer," advertising, Jan. 13, '75, to Jno. F. Coyle, Washington, D. C.,		124	19
4. E. R. Cunningham, L & D,	T	12	75
5. H. P. Gilbert & Co., 1 wagon cover,	G	12	00
6. Publisher of "Chronicle," advertising, $343 G, claimed	"	259	88
7. John Farrell, lumber,	"	19	48
8. A. J. Joyce & Co., repairing wagon, G	"	87	57
9. J. W. Nairn & Bro., druggs &c., G	"	65	21
10. Thos. Ward & Thos. Kelly, bl'ksmithing,	G	33	00
11. Palmer & Sly, coal,	"	42	50
12. Jas. S. Tapham & Co., repairs of harness, G	"	29	32
13. R. P. Buford, " " wagons,	"	20	23
$249.19—C—$581.88 T. Total with C & T.		$831	07

Mississippi.

1. Oscar T. Keeler, ag't, Columbus, Miss., July 3, '74, & ag'n Oct. 14, '74, & to W. M. Keeler, 353 & 355 Canal st., New York, Jan'y 7, 1875.	C	$1,242	34

Alabama.

1. M. W. Hutcheson, ag't., Mobile, Ala.,	C	350	00
2. T. Titcomb, stationary, Montgomery, Ala., July 20, '74,	T	7	25
3 Henry St. Paul & Co., advertising, "Mobile Daily Times,"	G	25	00
4. James Conning, repairing watch,	"	5	00
5. Edward Schloss, L. & D., Mobile,	"	239	87
6. Petty & Sawyer, legal service, "	"	640	00
7. "Mobile Daily Tribune," advertising "	"	31	00
8. "Advertiser & Register," printing, "	G "	187	50
$350—C—$3,135.62 T. Total C & T,	"	$1,485	62

9. Young & Words. L & D—Gold coin Eufala.

			old
Conant & Young, N. Y.,	T	2,000	2

Illinois.

1. Charles W. Field, ag't, Cairo, July 3, '74,	T	366	00
× M. W. Hutcheson, July 20, '74.			

No. 2.

Tennessee.

1. Sims & Hamilton, office rent, Chattanooga, G ×,	T	33	00
2. F. E. Mars, ag't,	C	214	40
$33—T—$214.40—C. Total T & C.,		$347	40
× Sent July 9, '74, to Sims & Hamilton.			

West Virginia.

1. R. A. Jeffrey, agent, Ellenbore,	C	28	00
2. J. Floyd McCulloh, messenger, Parkersburg, July 21, '74, $836.92, rend, Jan. 12, '67.		58	33
3. Robert Higgins, Harness, Wheeling, July 9, '74, & Geo. McMasters, $654.03, July 28, '74.		1,733	50
4. C. W. McMullin, repairing, &c., Parkersburg, July 21, '74,		5	57
5. Berger & Hoffman. L & D. Wheeling,		8	65
6. S. Downy, ag't, Piedmont, July 21, '74,	T	91	33
7. G. E. Leps, " New Creek,	"	40	50
8. Dames DuP. Fenton, Grafton, } Both to Fenton, G July 9, '74,	"	100	00
9. S. E. Poor, clerk, do., }	"	80	00
10. Sperdth & Inderriden, Loss & Damage,	"	14	50
11. J. C. Orr & Co., Stationary,	"	6	05
12. Walters & Kraft, Bl'ksmithing,	"	12	00
13. T. H. Logan & Co., Oil,	"	1	00
14. Bushfield, Wallace & Co., Oil & Putty,		1	10
15. J. W. Houck, ag't, Piedmont, July 21, '74,		39	00
16. Hamilton & Nagle, sign,		2	00
17. " Wheeling Intelligencer," (Campbell, Tlan & Co.,) advertising, July, '74,	G	41	65

18. "Wheeling Register," (Lewis Baker) July 9, '74, 35 00

$1,834.05—C—$464.13—T. Total C & T, $2,298 18

North Carolina.

1. John G. Justice, ag't, Lincolnton, July 21, '74, C 130 00
   Capt. Farrell, July 27, '74, 21, '74.
2. Thomas K. Davis, ag't, Weldon, July 21, '74, " 92 94
3. J. Reynolds. L & D, Charlotte, " 21, '74, 45 00
4. D. S. Ryan, ag't, Kingston, " 21, '74, T 61 00
   V Aug'st 12, '74.
5. Atlantic & N. C. R. R. Co. Transportation E. R. Stanly, Pres't, Newbern, N. C., 525 67
   July 9, '74.
6. Raleigh & Gaston R. R. Co., × Transportation, W. J. Hawkins, Pres't Ridgeway, 1,195 33
   N. C.
7. Wilmington & Weldon R. R. Co., Transportation, wrote directors, Ag'st 12, '74, " G 970 73

$267.94—C—$2,752.73 T. Total C & T $3,020 67
× withheld for the present—sent 14, '74, × of Co. Raleigh Jan. 15, '75 am't $1,872.67

× and p'd to Capt. John Tarrell, Weldon, N. C., Mr. 20, '66.

No. 3.

all marke– S to Lous Stix & Co. July 2, '74, also July 23, '74.

Ohio.

1. C. W. Starbuck & Co., advertising, Cincinnati, S C 30 00
2. Fitch & Bro., " Chilicothe, 17 00
3. D. McFarland, " Portsmouth, G 10 00
4. J. W. Newman, " do., C 6 00
5. E. Raine, " do., 2 00
6. Brown & Davis, Repairing harness, Cin., S 19 15
7. Sam'l Blair & Co., Ice, " S 26 60
8. F. E. Snire & Co., Merchandize, " S 18 82
9. C. B. Prather & Co., Furniture, " S 10 75
10. Maguire & Co., Hay, " S 6 20
11. Anderson & McFarland, horse feed, Ports-

	mouth,	G	"	11 91
12.	Wm. Huddart & Co., repairs of J. Keid & Track, Cin.,	S	"	3 00
13.	J. B. Shroder, padlocks,	S	"	3 75
14.	H. G. Strobel, watering street,	S	"	5 00
15.	Louis Stix & Co., rent,	S	"	500 00
16.	Western Union Tel. Co., July 25, '74, telegraphy, months, to Nov. 21, '66		"	150 00
17.	John M. Owen, L & D, Cin.,	S	"	8 50
18.	Smith, Hawley & Co., furniture, Cin.,	S	"	35 00
19.	J. Black, office rent, Hillsboro',		"	16 67
20.	Capatinus Shaffer, stable rent, Portsmouth,	G	"	6 20
21.	R. B. Smith, stable rent, Cin.,	S	"	40 00
22.	Peter Hoffman, stable rent, Chilicothe,		"	9 00
23.	J. Taylor, hauling, Leesburg,	G	"	10 00
24.	P. Doherty, hauling, Hillsboro',	"	"	20 00
25.	John Taylor, hauling, Greenfield,	G	"	10 00
26.	John Dean, hire of horse, Athens,	G	"	22 50
27.	C. D. B. Webster, ag't., Chilicothe,	G	"	83 00
28.	W. H. Glenn, ag't., Hillsboro',	"	"	75 00
29.	E. Winchester, ag't., Marietta,	G	"	69 34
30.	T. J. Gresham, ag't., Portsmouth, Ohio,	G	"	75 00
31.	—— ——, ag't., Loveland, Ohio,		"	5 00
32.	J. S. Hawk, ag't., McArthur, Ohio,	G	"	28 03
33.	—— ——, ag't., Portland, Ohio,		"	11 90
34.	—— ——, ag't., Lyndon, Ohio,		"	1 40
35.	—— ——, ag't., Scioto Furnace, Ohio,		"	3 10
36.	—— ——, ag't.. Lilue Hocking, Ohio,		"	1 00
37.	—— ——, ag't., Webster, Ohio,		"	2 40
38.	R. C. Kinkle, Agst. 1, '74, Greenfield, Ohio,		"	12 50
39.	—— ——, ag't., Washington, Ohio,		"	1 75
40.	—— ——, " Cross Roads, Ohio,		"	1 40
41.	—— ——, " Pioneer, Ohio,		"	2 40
42.	—— ——, " Irwin's Station, Ohio,		"	1 60
43.	—— ——, " Harnden, Ohio,		"	10 00
44.	—— ——, " G. & W. Pike, Ohio,		"	5 00
45.	—— ——, " Jackson, Ohio,		"	15 00
46.	—— ——, " Blanchester, Ohio,		"	10 00
47.	—— ——, " Macyville, Ohio,		"	5 00
48.	—— ——, " Zuliskee, Ohio,		"	10 00
49.	—— ——, " Vincent, Ohio,		"	5 20
50.	—— ——, " King Coal Mines, Ohio,		"	1 00
51.	—— ——, " Martinsville, Ohio,		"	4 70
52.	—— ——, " Hope Furnace, Ohio,		"	7 30
53.	—— ——, " Raysville, Ohio,		"	3 10
54.	—— ——, " Vinton Furnace Co., Ohio,		"	1 95
55.	—— ——, " Frankfort, Ohio,		"	7 20

56. —— ——, " Londonderry, Ohio,	"		5 70
57. Sherman Bailey, clerk Chilicothe, Ohio,	"		35 00
58. Earhart Buman, driver, " "	"		40 00
59. John Murphy, " " "	G "		20 83
60. F. W. Winchester, clerk, Marietta, Ohio,	G "		25 00
61. William Grimes, clerk, Portsmouth, Ohio,	G "		40 00
62. E. Shaffer, driver, Portsmouth, Ohio,	G "		50 00
63. Paid by G. H. Swift, ag't., driver, Jackson, Ohio.	G "		15 00
Total C.,			$1,684 90

No. 4.

Georgia.

1. H. W. Cottingham, agent, Augusta,	C		$585 66
2. J. H. McDade, messenger,	C		100 00
3. F. A. B. Jennings, "	C		56 66
4. R. W. Atwell "	C		75 00
5. P. S. Johnson, "	C		108 33
6. R. M. Demere, " Savannah, R. Hendricks, July 20, '74	× C		95 00
6. H. C. Grubb, clerk, see South Carolina list R. Hendricks, ag't. $250	× C		131 65
8. F. Shackleford, messenger, Macon, July 20, '74,	C		55 66
9. Hunter & Gammell, transportation, Savannah, R. Hendricks, ag't., July 20, '74	× C		151 88
10. —— ——, L & D, Columbus, Ga., July 20, '74, J. Bond.	T		233 00
11. A. H. Coutes, ag't., Eatonville, July 20, '74,	"		30 00
12. J. H. Nichols, " Milledgeville, July 20, '74,	"		90 62
13. C. M. Davis, messenger,	"		6 70
14. J. T. Jenkins & Co., oil and drugs, Atlanta, July 20, '74,	"		16 60
15. C. W. & H. R. J. Long and Billups, oil and drugs, ——	"		59 41
16. J. J. Ford, truck and repairs of wagon,	"		52 00
17. Ogletree & Grubb, carpenters' work,	"		52 75
18. S. S. "Herman Livingston," transportation, Note No.	"		67 35
19. J. A. Witherspoon, carpenters' work, Athens, 23, July 20, '74, Do.	"		66 90

20.	The town of Athens, Ga., license for wagon ($22),		"		22 00
21.	Mrs. C. A. Johnson, L & D ——,		"		315 00
22.	E. R. Hodgson & Bro., wagon repairs,		"		23 00
23.	Nicholson, Moss & Hutcheson, office rent, Athens, July 20, '74,		"		75 00
24.	James Bond returned included office rent, Columbus, July 20, '74,		"		135 00
25.	Stockton & Co., advertising, Augusta,		"		96 87
26.	F. Arnold & Co., L & D, R. Hendricks.		"		130 75
27.	Geo. A. Mercer, legal services, Savannah, July 20, '74,		"		25 00
28.	Roswell King, Augusta,		"		100 15
× 29.	Alabama & Florida R. R. Co., transportation, Chas. T. Pollard, Pres't Mobile & G. N. R. R.				214 37
× 30.	Mobile & Great Northern R. R. Co., transportation, Montgomery, Ala., (now Ala. Central) W. L. Lanier,				155 82
31.	Selma & Meridian Do. R. R. Co., Selma, Ala., July 9, '74,				174 89
	$359.84—C. $2,143.18—T. Total C & T,				$2,503 02

× Ala. & Fla. R. R. Co. consolidated with Mobile and G. N. R. R. in 1868, May 1.

No. 5.

Virginia.

1.	M. B. Poitiaux, cashier Richmond office,		C V		28 00
2.	W. M. Keblinger, ag't., Charl't'ville (dec'd), Both to W. J. K.	×	G—		95 00
3.	W. J. Keblinger, ag't, Charlottesville,	×	G		100 00
4.	J. L. Brode, messenger,		" V		134 15
5.	Edwin W. Wade, clerk ( ), Richmond,		"		37 66
6.	J. J. Terrill, L & D (gold), Lynchburg, July, 9, '74,		"		291 00
7.	J. B. Rhea, reclamation (over-charge),		T		40 91
8.	Margaret W. Day, office rent, Norfolk, J. A. D. & Co., July 31, '74.	×	"		274 98
9.	Page & Maury, attorney's fees, Richmond,		" V		1,300 00
10.	Richmond & Danville R. R. Co., transportation, bal August 30, '66,		"	V	1,454 44
11.	Do. Do. Do. " May, '66		"	V	1,094 05
12.	Do. Do. Do. " July, "		"	V	667 95
13.	Do. Do. Do. August, "		"	V	634 37
14.	Do. Do. Do. Sept., "		"	V	973 00

$4,823 81.

×15.	Rich'd, F'd'g & Poto'ac	Do., Sept.,	G	"	V	2,810 42
16.	Seab'd & Roanoke	Do., June & J'y	G	"		233 37
16.	Do. Do.	Do., August,	G	"		362 33

2,810 42
No. 2, 2,542 82

$5,353 24
233 37
362 33

5,958 94

18.	Virginia Central R. R. Co., 31st, J. H. Wyne, Pres't, Richmond, to Poitiaux, July 9, '74.		G	"	V	1,968 43
19.	Rich'd & Pet'b'g Do.,	Nov. 2,	"	"		351 19

×See No. 22.

Reuben Ragland, pres't, Petersburg, July 9, '74.

20.	Petersburg, do.	Aug. 31, July 22, '74		"		406 82
21.	Orange & Alexandria do.,	July, Aug't & Sep.,		"		2,176 88
22.	× Richmond, Fred'g & Po'mac do.,	August, 1866,	G	"	V	2,542 82
23.	Potomac Ferry Co., Alexandria, Va., Aug'st & Sept.,		" G	"	×	290 87
24.	Richmond Dispatch, advertising,				V	169 08
25.	Richmond Times, 2 bills $30 & $45,				V	75 00
26.	R. M. Smith & Son, Enquirer, Richmond,				V	121 00
27.	Gallagher & Co., " Va. Free Press,"				×	20 00
28.	R. W. Hunter, " Winchester Times,"				×	12 00
29.	" Winchester News,"				×	10 00
30.	L. H. Fitch, Messenger,				V	86 95
31.	E. W. Anderson, do.,				V	50 00
32.	State of Virginia, tax on gross receipts,				V	516 72
33.	City of Richmond, city tax,				V	1,000 00

See No. 15.

Carried forward, $20.279 89 V

Amount bro't forward, $20,279 89 V

34.	Warwick & Barksdale, horse-feed, Richmond,		T			54 50 V

35.	H. K. Douglass, attorney's fees. These 3 to Richards,	" ×		10 00 V
36.	D. T. Richards, agent, Winchester, Sept. 1, '66,	"		50 00 V
37.	J. B. Taylor, stable rent, do.,			5 00 V
	C $686.31. T $19,013.08. Total C & T,			$20,399 39 V

July 3, '74, wrote M. B. Poitiaux, Richmond, Va., and enclosed list of all marked V.

July 3, '74, all marked × sent direct to the parties, except the last three, all of which sent to D. T. Richards, Winchester.

National Express Co. to Petersburg R. R. Co.

1866.			
Sept. 1 to 31—To freight to and from Weldon,	900 54		540 32
" 59 safes to & " "	59 00		34 40
			$575 72

No. 6.

New York.

1.	Merwin & Simpkins, L & D, 262 Broadway, Successors of Merwin & Bray.	C	$	10 00
2.	S. A. Elliott, July 9, '74, L & D, 10 Courtland st.,	C		94 50
3.	Benton H. Martin, July 9, '74, L & D, 54 Barclay,	C		116 75
4.	N. W. Belcher & Co., L & D, July 9, '74, F. W. N. Harbuck, Warrenton, Ga., N. H.	C		200 00
5.	Stephen Lane, L & D, 205 Canal st., G, 124 Chamber's st.,	C	V	255 00
6.	H. Danford, L & D, 26 Courtland st.,	C		9 00
7.	Abernathy & Co., L & D,	T	V	92 37
8.	E. & H. F. Andrews & Co., L & D, $11.50—113.02 & 230.89 wrote to Anthony & Co. July 30.	"	V	355 41
9.	Thomas Chalmers, L & D,	"	V	122 50
10.	A. M. Hays & Co., do.,	"	V	35 00
11.	T. Frank & Co., do,	"	V	123 50
12.	Gordon & Slater, do.,	"		9 75
13.	Richardson & Co., do.,	"		23 76
14.	Joseph Schneider, do.,	"		50 00

15.	R. Ibbotson, pres't, &c., L & D,		"	V	191	11
16.	D. Appleton & Co.,	do., July 20,	"	V	57	79
17.	J. H. Foote,	do.,	"		100	00
		V To each marked thus.				
18.	E. J. Houseman, L & D, July 7, '74,		"		14	50
	C $685.25—T $1,175.69 Total, C & T,				$1,860	94

South Carolina.

×	1.	Wm. T. Walker, agt., Charleston,	G	C V	75	00
	2.	R. Hendricks, " Savannah, July 20, '74,		"	250	00
	3.	M. G. Farrh, messenger, Cheraw, July 20, '74,		"	129	00
×	4.	A. Cudworth, " Charleston,		"	76	26
×	5.	S. D. Easterly, rent, " Depapure, att'y,		"	93	75
×	6.	W. S. Depanpure, legal services, Charleston,		"	300	00
	7.	Hiram Harris, stationery & printing, $360.40–$386–$66.77, O. A. F. Ravenel, pres't, July 9, '74.		"	393	75
×	8.	N. E. R. R. Co., transportation, Sep., Oct, & Nov., '66,		"	812	27
×	9.	Cameron & Barclay & Co., lanterns, 150 Meeting st., Charleston,		"	37	50
×	10.	Canstens & Jacobs, harness & repairing, Meeting st., Charleston,		" G	17	50
	11.	Geo. D. Ladd & Co., L & D, Winnsboro, July, 20, '74,		"	80	00
×	12.	Sawner & Ferguson, carpenters' work,		T	83	50
×	13.	C. D. Frank, repairs of wagon,		T	6	25
		Carried forward,			$2,354	78
		Amount bro't forward			$2,354	78
×	14.	Wm. Brookbanks, gas pipes, &c.,		T	63	90
	15.	Evans & Cogswell, office rent,	G ×	"	300	00
×	16.	Benj. M. James, blacksmithing, $3.30, wrote again July 21, '74, Wm. J. Magrith, pres't, Charleston, S. C., July 9, '74.	G	"	22	50
	17.	S. C. R. R. Co., transportation,			3,295	10
	18.	Charlotte & S. C. R. Co., transportation,			881	27
×		July 20, W. S. Walker, agent, C $2,265.03. 4,652.52. Total, C & T,		T	$6,917	55
		× To them July 7, '74.				

No. 7.

Pennsylvania.

1.	S. P. Wiltbank, agt., Philadelphia,	G	C	$595	90
2.	C. J. Wiltband, ass't agt., Philadelphia,	G	"	285	50
3.	Wm. Wyman, receiving clerk, Philadelphia,	G	"	135	25
4.	T. Dougherty, delivery " do.,		"	127	25
5.	Thos. P. Bacon, billing " do.,		"	240	85
6.	Wm. C. Ford do., " do.,		"	G 90	10
7.	A. T. Lavalette, cashier, " do.,		"	14	00
8.	C. C. Thompson, messenger, N. J. & Phil.,		"	60	00
9.	David Buest, "		G	60	00
10.	H. D. Basler, driver,		"	21	55
11.	Benj. Flood "		G	17	58
12.	Edward Beans, "		G	38	32
13.	H. Montgomery, driver,		"	12	02
14.	B. N. Oakman, "		"	25	55
15.	John H. Maxwell, helper,		"	9	50
16.	James Millman, "		"	10	52
17.	Fred. Nagle, watchman,		G	20	30
18.	Oglesby & Hodge, gas fixtures, 4 s. 7th st.,		"	72	68
19.	James M. Cooper, labor & materials,		"	49	25
20.	McCandless & Smith, L & D,		"	15	00
21.	Tucker & Sapman, transportation,		"	647	59
22.	Weinstein & Bro., L & D,		"	24	00
23.	Sarah B. Vanysyckel, rent of office, Philadelphia,		"	1,305	00
24.	McCall & Monteith, blacksmithing,		T	29	68
25.	Fulton & Wilkes, wagon repairs,		"	61	01
26.	Philip S. Justice, leaden dies,		G	90	80
27.	Andrew Johnson & Co., ———,		"	6	06
28.	C. L. Cadwallader, horse feed,		"	132	75
29.	Warner & Co., " "		"	39	90
30.	E. Ketterlmas, printing,		"	28	00
31.	James J. Martin, stationery & printing, 2 bills, $236.25 & $46,		"	282	25
32.	William Mann,		"	41	00
33.	R. McClure, veterinary surgeon,		"	50	00
34.	James B. Smith & Co., printing, &c.,		"	166	44
	Carried forward,			$4,805	60
	Amount bro't forward,			$4,805	60
35.	H. B. & A. Taylor, agents, Chester,	T		100	00
36.	Tryon Bros. & Co. L & D,	G		259	18

37. S. Bonnaffou,	do.,	"	279 30
38. Powers & Weightman,	do.,	"	132 50
C $3,877.71—T $1,698.87. Total C & T,			$5,576 58

Wrote S. P. Wiltbank (addressed letter to S. P. & C. J. W.), State ag't and ass't do.), Phil., & inclosed list of the above, July 3, '74.

P. W. & B. R. R. Co.	
Cas. acceptance due Sept. 21, '66,	$1,901 60
" " " " 28, '66,	1,143 29
" " " Oct. 6, '66,	1,597 60
" " " " 23, '66,	1,769 60
Protest fees,	9 25
	$6,921 25

No. 8.

Delaware.

1. Boughman, Thomas & Co., Stationery,	T	$12 25
2. Thos. B. Eaton & Co., Ice,		2 85
3. A. A. Laws, Driver, Wilmington,		35 00
4. F. A. Goddard, agent,		27 93
5. Dickerson & Robelen, Hire of Horse,		51 00
6. W. A. Wisdom, Bl'ksmithing, &c.,		4 50
7. Underwood & Conner, Keeping Horse,		15 00
8. J. P. Smith,		18 00
9. Wm. McCauley & Co., Rent of Office,		25 00
Total,		$191 53

Wrote to F. A. Goddard, Wilmington, Del., formerly agent, July 6, '74. Returned enclosed and re-sent, July 22, '74, to W. McCauley & Co.

New Jersey.

1. Williamson & Co., Wagons, Resident of Balt.,	$180 19

No. 9.

Maryland.

& July 25, '74.

1.	Louis Green, clerk, Annapolis, July 15, '74, } all to address of C. H. & M. House, ×	C	80	00
2.	C. H. & M. House, Annapolis, July 15, '74, } Geo. W. Dobbin, att'y.	"	90	00
3.	Hollingsworth, Warfield, pay as Sup't and notes of Co.,	"	5,171	36
4.	Baltimore Steam Packet Co., Transportation,	G	347	76
5.	Baltimore Gas Light Co., Gas consumed,	"	92	98
6.	do. do. do. do., Service Pipes,	"	22	48
7.	Herman Born (Born & Ruth), repairs wagons, 37 Waeshe St.,	" G	32	25
8.	Adam Kahler, horse feed, 365 W. Balt.,	" G	91	85
9.	Gibson & Kirk, locks, &c.,	" G	36	40
10.	" Baltimore Sun," advertising,	"	28	25
11.	Henry Roth, repairs wagons, 35 Waeshe St.,	" G	23	35
12.	Bibb & Co., putting up and wiring stove,	"	2	00
13.	Fred'k Oelmann, repairs wagons, 61 and 65 German,	"	14	66
14.	L. Green, ag't, Havre de Grace, wrote July 16, '74,	"	112	21
15.	Canfield, Bros. & Co., L. & D., 229 W. Balt. St.,	G	373	66
16.	Burton & Irving, do., 168 " " "	G	31	00
17.	Andrews & Thompson, do., 5 " " "	G "	16	80
18.	George Brown, do., 655 Charles St.,	"	40	41
19.	Geo. W. Webb & Co., do., S. E. cor. Light and Balt. sts.,	"	25	00
20.	Hodges Bros., L. & D., 23 Hanover st.,		36	60
21.	Cushings & Bagly, L. & D., 262 W. Balt. st.,	G	31	62
22.	Schwerdtman & Co., do., 327 " " "	"	29	13
23.	Rudolph Oehl, driver,		88	33
24.	Daniel Seaton, "	G	115	00
25.	John Watkins, watchman police,		21	00
26.	A. J. Smith, solicitor,		60	00
27.	McC. Y. Barry, clerk at depot, Halifax, N. S., wrote July 14, '73,		139	23
28.	W. H. C. Bayly, clerk at depot, Washington,		62	50
29.	Stephen Cremin, porter,		32	00
30.	George Bishop, clerk,		30	00
31.	G. A. Schwartzman, ag't Balt. office,		43	88
32.	F. B. Berkeley, clerk Balt. office,		114	00

33.	Milton Bull, driver, 697 W. Balt. st.,			115 00
34.	Henry Vaughan, driver, Aug. 25, '74,			50 00
	Carried forward,			$7,600 71
	Brought forward,			$7,600 71
35.	Geo. Bond, driver,		C	57 05
36.	Andrew O'Meara, driver,			45 57
37.	James Hood, "			24 56
38.	W. H. Tibals, "			34 68
39.	Edw'd McGeehan, "			57 84
40.	F. Grill, "			19 25
41.	Jacob Arnold, "			13 00
42.	John Manly, groom,			23 57
43.	Thos. McCullough, groom,			25 00
44.	Thos. Burns, "			25 00
45.	A. Boyce, watchman,			28 00
46.	F. Craig, mess. with wagons,			10 80
47.	J. Schleifer, " " "			7 94
48.	W. F. Anderson, weigher,		"	17 50
49.	Geo. McAllister, extra conductor B. & O., laborer,		"	18 50
50.	S. Bishop, mess. at depot,		"	11 00
51.	Martin Clark, mess. Balt. office,		"	92 73
52.	Geo. Clark, driver,		G	63 00
53.	S. S. Mann,	L & D,	T	116 20
54.	H. Frank & Co.,	do.	G	24 00
55.	Mrs. S. C. Ricketts,	do.	"	20 00
56.	C. E. Needles,	do.	"	8 00
57.	E. Whitman & Sons,	do.	G	10 00
58.	J. H. Walzl,	do.	"	59 22
59.	McDowell, Robinson & Co.,	do.	G	156 50
60.	John T. Watkins,	do.	"	14 00
61.	Hild & Mitchell,	do.	"	17 69
62.	R. Sinclair & Co.,	do. and trucks,	"	30 65
63.	Do.	do.	"	3 25
64.	Boerman & Littlebaum,	do.	"	39 27
65.	Weiglien & Heilner,	do.	"	11 82
66.	Walter S. Moore & Co.,	do.	"	26 76
67.	J. W. Ebert & Co.,	do.	"	7 00
	Amount carried forward,			$8,700 06
	Maryland continued.			
	Amount brought forward,			8,700 06
68.	L. H. Miller, safes,		G T	2,300 00

69. Thos. D. Johnston, insurance for August, 1866,	"	1,274	41
70. Bolton Brothers, lanterns,	"	17	50
71. David Anderson, bl'ksmithing,	"	67	75
72. W. H. Oler, ice,	"	19	15
73. Kelly & Piet, stationery & printing, July, August, Sept. & Oct.,		2,222	47
74. "Evening Transcript," advertising,	"	116	07
75. Montgomery Slade & Co., 1 p'r store skids,	"	6	00
76. Edward Sinn, livery of horse,	"	3	50
77. P. P. Pendleton, horse feed,	"	106	80
78. J. A. Pierce, messenger,	"	155	58
79. D. Claude, rent of office, Annapolis, July 15, '74,	"	25	00
80. W. H. Glancott, agt., Berkely Springs,	"	36	25
81. Hil'd Wammelle & Mitchell, overcharge,	"	4	45
82. R. H. Tall, medical services,	"	4	00
83. James T. Ball, agt., Sumittsville,	"	15	00
84. B. & O. R. R. Co., transportation, $41,432.48, $21, $10.60,	"	41,472	08
85. John Nugent, horse feed,	"	75	69
86. A. S. Abell & Co., advertising, Baltimore "Sun,"	"	21	42
		15.36	
87. Ammidon, Cranbie & Co., oil, &c.,	G	16	26
C, $8,175.70; T, $48,483.41 Total, C & T,		$56,659	11

No. 10.

Statement Showing Amount Due the the Employees of the N. E. & T. Co., at Baltimore and its vicinity,

1. George Clark, driver,	63	00
2. Rudolph Oehl, "	88	33
3. Dan'l Seaton, "	115	00
4. McC. Y. Barry, in charge of depot, s. H. st.,	139	28
5. W. H. C. Bayley, clerk at do.,	62	50
6. S. Cremin, porter, Balt. office,	32	00
7. Milton Bull, driver,	115	00
8. Geo. Bishop, clerk,	30	00
9. Henry Vaughan, driver,	50	00
10. George Bond, do.,	57	05
11. Andrew O'Meara, driver,	45	57
12. J. Hood, do.,	24	56
13. W. H. Tibals, do.,	34	40
14. E. McGeehan, do.,	57	84
15. F. Grill, do.,	19	25
16. J. Arnold, do.,	13	00

17.	J. Manley, groom,	23 57
18.	Thomas McCullough, groom,	25 00
19.	Thos. Burns, do.,	25 00
20.	S. C. Taliaferro, clerk,	75 00
21.	C. M. Davis, messenger,	71 66
22.	C. Yungling, sub agent, &c.,	314 85
23.	A. Boyce,	28 00
24.	F. Craig, mess. with wagons,	10 80
25.	J. Schlieffer, do.,	7 94
26.	W. F. Anderson, weigher at depot,	17 50
27.	Geo. McAllister, laborer,	18 50
28.	S. Bishop, mess.,	4 00
29.	Martin Clark,	92 22
30.	F. B. Berkeley, clerk to cah'r,	114 00
31.	Thos. Dobbin, night money clerk,	75 00
32.	W. H. Gordon, night-watch, Balt. office,	12 50
33.	R. H. Crawley, messenger,	165 00
34.	Edward L. Clark,	56 22
35.	A. V. Stewart, manifest clerk,	120 50
36.	Thos. H. Cook, clerk,	149 50
37.	Benj. R. Grymes, mess.,	60 00
38.	W. L. Kelle, record'g clerk,	141 97
39.	Geo. Walter, driver,	95 00
40.	G. A. Schwartzman, ag't,	43 88
41.	John Wilkins, watch,	21 00
42.	A. J. Smith, solicitor,	120 00
43.	R. T. Allison,	167 50

40 St. Paul st.,
Receiver's office,
Balt., Md.,
April 16, 1867.

I certify the above to be correct, and taken from the books of the Co.

L. R. SMOOT,
For Thos. G. Pratt, Receiver.

The National Express & Transportation Co.

To W. H. C. Bayley.

1866.

Sept. 30—For one month's services as clerk at depot, 260 s. Howard st.,	$65 00	
By cash of Balt. agency,	2 50	
		$62 50

Correct—G. A. Swartzman, ag't.

The National Express and Transportation Co.

To R. A. Crawley.

1866.

Sept. 30—For services as messenger from June to date, $225 00
By cas- of Balt. agency, 60 00

Balance due, $165 00

Correct—G. A. Schwartzman, ag't.

The National Express & Transportation Co.

To J. Schleiffer.

1866.

Sept. 30—For services as messenger with Company's wagons in Sept., 1866, $7 94

Correct—G. A. Schwartzman, ag't.

The National Express & Transportation Co.

To F. Craig.

1866.

Sept. 30—For services as messenger with Company's wagons in Sept., $10 80

Correct—G. A. Schwartzman, ag't.

The National Express & Transportation Co.

To J. Hood.

1866.

Sept. 30—For services as driver in month of Sept., $24 56

Correct—G. A. Schwartzman, agent.

The National Express and Transportation Co.

To Henry Vaughan.

1866.

Sept. 30—For one month's services as driver (Sept., 1866), $50 00

Correct—G. A. Schwartzman, ag't.

The National Express & Transportation Co.

To W. H. Tiball.

1866.

Sept. 30—For 24 days' services as messenger with Company's wagons, @ $43 per mo., $34 40

Correct—G. A. Schwartzman, ag't.

The National Express & Transportation Co.

To Thomas Dobbin.

1866.

Sept. 30—For services as night-money clerk, Balt. office, for the month of September 1866, $75 00

Correct—G. A. Schwartzman, ag't.

The National Express & Transportation Co.

To Stephen Cremin.

1866.

Sept. 30—For one month's services as porter, Balt. office, $52 00

By cash of cashier, 20 00

$32 00

Correct—G. A. Schwartzman, ag't.

The National Express and Transportation Co.

To George Bishop.

1866.

Sept. 30—For one month's services clerk in Balt. office, $65 00

By cash of Baltimore agency, 35 00

Balance due, $30 00

Correct—G. A. Schwartzman, ag't.

The National Express and Transportation Co.

To George Clark.

1866.

Oct. 3—For services as driver for Sept., 1866, $60 00

1½ days in Oct., 3 00

$63 00

Correct—G. A. Schwartzman, ag't.

The National Express and Transportation Co.

To F. B. Berkeley.

1866.

Oct. 10—For services as clerk to "cashier" Balt. office from Aug'st 1 to date @ $75 per month, $175 00

By cash rec'd of cashier, 61 00

Balance due, $114 00

Correct—G. A. Schwartzman, ag't.

The National Express and Transportation Co.

To Thos. McCullough.

1866.

Oct. 20	For one week's services as groom, Glenn st. stables,	10 00
27	For one week's services as groom, Glenn st. stables,	10 00
Nov. 4	For one week's services as groom, Glenn st. stables,	10 00
		$30 00
	By cash Balt. agency,	5 00
	Balance due,	$25 00

Correct—G. A. Schwartzman, ag't.

The National Express and Transportation Co.

To Thomas Burns.

1866.

Oct. 20	For 1 week's services as groom, German st. stables,	10 00
27	For 1 week's services as groom, German st. stables,	10 00
Nov. 4	For 1 week's services as groom, German st. stables,	10 00
		$30 00
	By cash of Balt. agency,	5 00
	Balance due.	

Correct—G. A. Schwartzman, ag't.

The National Express and Transportation Co.

To A. Boyce.

1866.

Oct. 20	For 1 week's services as watchman, German st. stables,	$14 00
27	For 1 week's services as watchman, German st. stables,	14 00
		$28 00

Correct—G. A. Schwartzman, ag't.

The National Express and Transportation Co.

To John Manley.

1866.

Oct. 20—For 1 week's services as groom, German st. stables,	$10 00
27—For 1 week's services as groom, German st. stables,	10 00
Nov. 3—For 6 days' services as groom, German st. stables,	8 57
	$28 57
By cash of Balt. agency,	5 00
Balance due,	$23 57

Correct—G. A. Schwartzman, ag't.

The National Express and Transportation Co.

To J. Arnold.

1866.

Oct. 20—For one week's services as driver strong team,	$13 00

Correct—G. A. Schwartzman, ag't.

The National Express and Transportation Co.

To F. Grill.

1866.

Oct. 27—For 1 week's services as driver of strong team,	$13 00
Nov. 3—6 days' " " " "	11 25
	$24 25
By cash of Balt. agency,	5 00
Balance due,	$19 25

Correct—G. A. Schwartzman, ag't.

The National Express and Transportation Co.

To. A. V. Stewart.

1866.

Oct. 31—For services as manifest clerk, Balt. office for the months of Sept. and Oct., 1866, @ $65,	$130 00
By cash of Balt. agency,	9 50
Balance due,	$120 50

Correct—G. A. Schwartzman, ag't.

The National Express and Transportation Co.

To Thomas H. Cook.

1866.

Oct. 31—For services as clerk at Balt. office for the months of September and October, 1866, @ $75,		$150 00
By cash of Balt. agency,		50
Balance due,		$149 50

Correct—G. A. Schwartzman, ag't.

The National Express and Transportation Co.

To Geo. McAllister.

1866.

Oct. 31—For services as laborer at depot, S. Howard st., from Oct. 13 to date,		$22 50
By cash of Balt. agency,		4 00
Balance due,		$18 50

Correct—G. A. Schwatzman, ag't.

The National Express and Transportation Co.

To George Bond.

1866.

Oct. 31—For two months' services as driver (Sept. and Oct., '66) $41,		$82 84
By cash of Balt. agency,		24 95
Balance due,		$57 05

Correct—G. A. Schwartzman, ag't.

The National Express and Transportation Co.

To E. McGeehan.

1866.

Oct. 31—For two months' services as driver (Sept. and Oct., '66),		$62 84
By cash of Balt. agency,		5 00
Balance due,		$57 84

Correct—G. A. Schwatzman, ag't.

The National Express and Transportation Co.

To Rudolph Oehl.

1866.

Oct. 31—For services as driver for Sept. and October, 1866, $88 33

Correct—G. A. Schwartzman, ag't.

The National Express and Transportation Co.

To J. Bishop.

1866.

Oct. 31—For services as messenger at depot from Oct 13 to date, $15 00

By cash of Balt. agency, 4 00

Balance due, $11 00

Correct—G. A. Schwartzman, ag't.

The National Express and Transportation Co.

To Andrew O'Mera.

1866.

Oct. 31—For two months' services as driver (Sept. and Oct., '66), $50 57

By cash of Baltimore agency, 5 00

Balance due, $45 57

Correct—G. A. Schwartzman, ag't.

The National Express and Transportation Co.

To W. F. Anderson.

1866.

Oct. 31—For services as weigher at depot, 260 S. Howard st., from Oct. 13 to date. $22 50

By cash of Balt. agency, 5 00

Balance due, $17 50

Correct—G. A. Schwartzman, ag't.

The National Express and Transportation Co.

To Mc. Y. Barry.

1866.

Nov. 3—For services in charge of depot, 260 S. Howard st., for Sept., Oct., and 3 d'ys in

November, @ 75 per mo.,	$157 50
By cash of Balt. agency, $17.27. By cash of cashier, $1,	18 27
	$139 23

Correct—G. A. Schwartzman, ag't.

The National Express and Transportation Co.
To W. H. Gordon.

1866.
Nov. 10—For one week's services as night-watchman, Balt. office, $12 50

Correct—J. T. M. Barnes, agent.

The National Express and Transportation Co.
To Edward L. Clark, Dr.

1866.

Dec'r 17—For services as messenger in Balt. office from Sept. 1, to Dec'r 17, '66, @ 26 per month,	$92 22
Cr. by cash of agency,	36 00
Balance due,	$56 22

Correct—J. T. M. Barnes.

Nos. 11 & 12.

August 1st, 1866.

The National Express and Transportation Co.
To. L. R. Smoot, Dr.

Mc'h 120 Apr. 150 May 150 June 150 July 150 $750	For services as ass't to the Gen'l Superintendent of the N. E. & T. Co., from March 8, to July 31, 1866, both inclusive, at $150 per month,	$720 00

Approved—B. F. Ficklin, Gen'l Supt.

Received payment.

[U. S. Inter. Rev. Stamp, 2 cts.]

Baltimore, August 10th, 1866.

Received of the National Express and Transportation Com-

pany, fifty dollars, in full for services in office of Gen'l Superintendent, from 1 Aug'st to 10th Aug'st, at $150 per month, $50.

Correct—J. J. Kelly, Gen'l Sup't.

[U. S. Inter. Rev. Stamp, 2 cts.]

No. 13.

H. Warfield, 4 notes of $750 each, dated August 10, '66, @ 3, 6, 9 and 12 months, balance of claim for services, &c., sworn to by him.

Geo. Clark, services as driver Sept., '66, $60, 1½ days in Oct., $3,		$63 00
John Watkins, certified for,		21 00
Rudolph Oehl, driver, Sept. and Oct., '66,		88 33
Dan'l Seaton, certified by G. A. Schwartzman, G		115 00
A. J. Smith, Sept. and Oct., '66, certified, G		120 00
McC. Y. Barry, services in ch'ge depot, 260 s. Howard st., from Sept. and Oct., '66, 3 days in Nov., @ 75,	$157 50	
By cash of Balt. agency, $17.27 by cash'r,	18 27	
		139 23
W. H. C. Bayley, clerk at depot, 260 s. Howard st., 1 month,	65 00	
By cash of Balt. agency,	2 10	
		62 50
S. Cremin, Sept. 30, 1 month services as porter Balt. of.,	$52 00	
By cash of cashier,	20 00	
		32 00
M. Bull, approved by ag't, for Sept. & Oct.,	$120 00	
By cash,	5 00	
		115 00
Geo. Bishop, Sept. 30, 1 month's services as clerk B. O.,	65 00	
By cash of B. A.,	35 00	
		30 00
H. Vaughan, Sept. 30, services driver for Sept., '66,		50 00
Geo. Bond, Oct. 31, " Sept. & Oct., '66,	82 00	
Cr. by cash of B. A.,	24 95	
		57 05
Andrew O'Meara, Oct. 31, driver, Sept. & Oct., '66,	50 57	
Cr. by cash of B. A.,	5 00	
		45 57

J. Hood, Sept. 30, services driver in Sept., '66, 24 56
W. H. Tiballs, 24 d'ys services in Sept., '66, @ $43 per month, mess. in ch'ge wagons, $34.40, 34 68
E. McGeehan, Nov. 2, driver Sept. & Oct., 2 d'ys in Nov., $62 84
By cash of B. A., 5 00
57 84
F. Grill, Oct. 27, 1 week's driving of strong team, 13 00
Nov. 30, 6 days' " " " 11 25
$24 25
By cash of B. A., 5 00
19 25
J. Arnold, Oct. 20, 1 week driving strong team, 1 week, 1 week, 6 days, 13 00
J. Manly, Oct. 20, Oct. 27, Nov. 3, $10, & 10, & 8.57, less 5, G 23 57
G. C. Taliaferro, certified by Kelly, 75 00
R. T. Allison, affidavit, 167 50
July 31, at Troy, N. Y.—Timothy Quinn, Troy, N. Y., services, ag't, &c., Harper's Ferry, G 220 00
W. L. McAfee, trustee, Wheeling, W. V., bal. on rent, rec'd $497.39 from sheriff, July 31, to Wheeling, W. Va., G 85 96
H. Heth, certified by Ficklin, 373 66
D. Anderson, bl'ksmithing, certified by, $67 50 G
do., " acc., 12 00
79 50

Aug't 6, 539 Broadway, N. Y.
Dwight Ripley (care of Bigelow & Frank, N. Y.), $500 lost, sent from Eufala, Ala.
J. Frank Brown, 606 w. Fay,
J. F., cor. Bank & Twelfth,
James F. Brown, assignee of C. M. Davis, 74 66
J. F., 120 Merher,
Jos. F., 501 n. Tremont,
Chas. Yeungling, certified by Keelly, 5 Pot., 314 85
Thomas & Moon, horse feed, Nov. 1, '66, 76 German st., G 136 00
Wrote Poitiaux about this July 31, '74, W. D. M., Lynchburg, Va., August 11, '74.
× W. D. Miller, Richmond, Va.
Draft of Briscoe Baldwin on J. V. H. Allen, treasurer, 10 d'ys sight, to his order, protested 27 Sept., '66, for 1,136 24
Buckley & Marbury, August 6, '74.
A. C. Jones, ag't, Washington, July 25, '66,

from C. Mayer, on cash'r Baltimore, 30 d'ys sight, accepted Sept 3, '66, due Oct. 3 (claim of (Union Fire Co.) Ward Bro.) 250 00

1 week, 1 week, 1 week,
Thomas McCullough, Oct. 20, 27, Nov. 4, as groom—cash rec'd, $5,
Thos. Burns same as above.

1 week, 1 week,
A. Boyce, watchman at stable, Oct. 20, Oct. 27, @ 14 per w. 28 00
F. Craig, mess. with wagons in Sept., '66, 10 80
J. Schleiffer, same as above.
W. F. Anderson, messenger at depot Oct. 31 from Oct. 13, to date, 22 50
Cr. by cash, $ 5 00
17 50

Geo. McAllister, laborer at depot from Oct. 3, to date, Oct. 31, 22 50
Cash rec'd, 4 00
18 50

S. Bishop, services as mess. at depot, Oct. 13 to 31, $15 00
Cash, 4 00 G
11 00

Martin Clark, certified by Kelly, 92 22
G. A. Scwartzman, Oct., ag't for Oct., $100 00
Balt. office, 56 12
43 88

F. B. Berkely, clerk to cash'r, August 1, to Oct. 10, @ 75, $175. Received of cash'r $61, 114 00
Aug'st 11, '74—W. H. Campbell, ag't at Fairmount, Va., 4 months' services as ag't, ending Oct. 1, '66, @ 20, $80.75. $80 75
Thos. H. Cook, clerk, B. A., Sept. and Oct., '66, @ 75, 150 00
Cash rec'd, 50
149 50

S. P. Wiltbank, Aug'st 14, '74—Do., cook for Nov., $75; cash rec'd, 10—trustees, 65 00
Grymes, Hempstead P. O., King Geo. co., Va.
Benj. R. Grymes, mess. Balt. to Wheeling, July 31, '74.
Sept., & 6 d'ys in Oct. @ 50, certifi. by Schwartzman, G 60 00
×W. L. Keller, clerk, Balt. office, certifi. by

	Kelly,		141 97
	W. H. Gordon, night-watch, 1 week's services, Nov. 4th to Nov. 10,		12 50
July 30, '74.	Mahlon, Fulton & Charles Walker, (Fulton & Walker, No. 35, No. 20 st., Phila.,) Judgment on open acc., $527.36 (Orig. acc., $511.01) Wiltbank, Aug't 14, '74,		527 36
	Arthur Shaaff, cash'r, Charleston, S. C., Dec., '66,	150 00	
	Cash p'd freight on property Co., p'd by him,	18 20	
			168 20
	A. V. Stewart, manifest clerk, Balt. office, P. D. $130 July. Sept. & Oct., '66, @ 65—$130, cash rec'd of B. A.,	9 50	
			120 50
	Geo. M. Walters, driver, Sept. & Oct., '66, @ 50, 24 Clark st.	100 00	
	Cash rec'd, $5 (certified by Kelly)	5 00	
			95 00
	Thos. Dobbin, night-money clerk, services, Sept., '66,		75 00
	R. A. Crawley, messenger, June to Sept. 30,	225 00	
	Less cash rece'd,	60 00	
			165 00

Barnes, ag't, from Nov. 6 to Dec, 17, 1866.
E. & H. T, Anthony, 591 Broadway, N. Y.
Lost packages—wrote July 30, '74.

No. 14.

List of claims against The National Express and Transportation Company, sent E. Platt Johnson, att'y at law, New York.

Claimants.	Amount.	Represented by.
B. & O. R. R. Co.,	$44,106 84	James A. Buchanan, Esq.
Bank of Commerce,	17,417 68	S. T. Wallis, Esq.,
Phil., Wil. & B. R. R. Co.,	6,921 25	Charles Marshall, Esq.
J. J. Terrill—gold,	291 00	
	68,736 77	do.
Rich'd & Fred'g & P. R. Co.,	5,353 24	L. R. Smoot.

Hollingsworth Warfied,	5,171 36		do.
S. C. R. R. Co.,	4,238 70		do.
Rich'd & Danville R. R. Co.,	2,842 68		do.
Wm. D. Miller,	1,138 55		do,
Wil. & Wel. R. R. Co.,	970 73		do.
Chas., Columbia & Aug. R. R. Co.,	881 27		do.
N. E. R. R. Co.,	812 27		do.
L. R. Smoot,	770 00		do.
Seaboard & Roanoke R. R. Co.,	597 88		do.
J. T. M. Barnes,	356 66⅔		do.
Bat. Steam Packet Co.,	347 76		do.
Louis Stix & Co.,	500 00		do.
Potomac Ferry Co.,	290 87		do.
		24,266 97	do.
Total,		93,003 74	Principal.

Baltimore, Md., June 12, 1876.

No. 15.

No. 388. 10 shares.

The National Express and Transportation Co.,
Incorporated under the law of the State of Virginia:

This is to certify that James L. Davis is entitled to ten (10) shares of the capital stock of The National Express and Transportation Company, on each share of which has been paid $5.00 in cash, leaving $95.00 to be paid when called for; transferrable only on the books of the company on surrender of this certificate.

Witness the seal of the company attested by the signature of the president and secretary.

[Seal.] J. E. JOHNSTON,
President.

P. T. MOORE,
Secretary.

Richmond, Va., January 25th, 1866.

Capital, $5,000,000. Shares, $100 each.

[U. S. inter. rev. stamp, 25 cts.]

Georgetown, D. C., Feb'y 5th, 1866.

Received of James L. Davis the sum of fifty dollars per share on ten shares of the capital stock of The National express and Transportation Company; making a total of ten dollars per share paid in on said stock to date.

G. S. GETTY,

Agent.

$50.00.

[U. S. inter. rev. stamps, 2 cts.]

And at another day, to-wit:

At a chancery court of the city of Richmond, continued by adjournment and held for said city on the 10th day of July, 1880.

John W. Wright, sheriff of the city of Richmond and administrator of W. W. Glenn, who sues, &c., Pl't'ff.

against

The National Express and Transportation Company & others, Def'ts

This came Joseph R. Anderson, by James Alfred Jones, his counsel, and opposed the consideration of this case at this time upon the ground, that under the circumstances no opportunity had been allowed for the examination of the commissioner's report and the want of proper parties, and that the case was not ready for a hearing, and moved the court to continue the case until the next term. And it appearing to the court that the report of Commissioner O. G. Kean, made under the order of enquiry entered herein on the 6th day of October, 1879, was filed in the clerk's office only on the 19th day of June ultimo, during the present term of the court, and that thus proper time has not been allowed to parties interested for the examination of said report, and the court having previously announced according to the usual rule before the closing day of the term, that on account of the great pressure of business and the impossibility of hearing other contested cases, it could and would receive and consider no papers in any contested cause after the 26th day of June ultimo. And it thus appearing that this cause is not ready for hearing, and cannot be heard at this time on the said report or any other contested matter, it is ordered that the case be continued to the next term of the court

And at another day, to-wit: At a chancery court of the city of Richmond, continued by adjournment and held for said city on the 14th day of December, 1880.

John W. Wright, sheriff of the city of Richmond, and as such administrator of W. W. Glenn, deceased, who sues, &c., Pl't'ff,

against

The National Express and Transportation Company and others, Def'ts.

IN CHANCERY.

This cause, in which proceedings have been had in the mode prescribed by the statute against the absent defendants, Wm. H. Perot, Wm. Devries, D. J. Foley, F. P. Zimmerman, J. Carter Mowbray, and Wm. H. Webb, and which has been regularly matured and proceeded in as to all of the defendants, came on this day to be heard upon the cause set for hearing as to the said absent defendants (M. G. Harman, one of the board of directors of said company, being dead, the suit is abated as to him), and upon the papers formerly read, the answer of the defendant, John Blair Hoge, and the orignal answer of John J. Kelly, both of which were tendered, to be filed at the last term, and are this day filed *nunc pro tunc*, and the amended and supplemental answer of the said defendant, John J. Kelly, this day filed, the general replications of the plaintiffs to the said revival answers, and upon the report of Master Commissioner O. G. Kean, of the 19th day of June, 1880, and the amended and supplemental report of said commissioner this day filed, to which said several reports there is no exception, and upon exhibits filed, and was argued by counsel. On consideration whereof, and for reasons expressed in writing, filed and hereby made a part of the record, and to be so considered, but not to be entered upon the order book, the court is of opinion (1st) that the deed of trust in the proceedings mentioned, bearing date the 20th day of September, 1866, made by the said National Express and Transportation Company to John Blair Hoge, John J, Kelley, and C. Oliver O'Donnell, trustees, for the benefit of sundry creditors therein referred to, is a good and valid deed under the laws of the State of Virginia, where the said corporation was chartered, and had its principal office, and where the said deed was executed, delivered, and recorded, and the court doth so adjudge, order, and decree. And the court is further of opinion (2ndly) that, under the laws of the State of Virginia, the legal effect of the said deed was to grant, convey, and assign to the said trustees all of the estate, property, rights, and credits of the said company of every kind, and wherever situated or being, and that accordingly all of the said estate, property, rights, and credits did pass to and were vested in the said trustees by the said deed, including the credits allowed by statute and by the said company to its stockholders for the uncalled for and unpaid part of their several subscriptions to the capital

stock of the said company, and the right to receive and collect the same according to the terms of said contract of subscriptions for the purposes of said trust, and the court doth so adjudge, order, and decree.

(3.) And the court being of opinion that the preferences provided for by said deed in favor of certain creditors therein referred to are legal and valid, according to the laws of Virginia, doth so adjudge, order, and decree.

(4.) And it appearing to the court that said John Blair Hoge and John J. Kelly, surviving trustees in said deed, are willing, each, to resign and renounce the office of trustee under said deed, and that they are so situated as not to be able efficiently to perform the duties of the same, and that it is right and expedient, under all the circumstances, that they be relieved from the said trusteeship, the court doth adjudge, order, and decree that the said John Blair Hoge and John J. Kelly, surviving trustees of themselves and C. Oliver O'Donnell, under the said deed, bearing date the 20th day of September, 1866, executed to them by the said National Express and Transportation Company, in trust for the benefit of its creditors, be and they are hereby respectively removed from the office of trustee under said deed.

(5.) And it further appearing to the court that John Glenn, Esquire, of number twelve St. Paul street, in the city of Baltimore, and State of Maryland, is a fit and proper person to execute the duties of said trust, it is adjudged, ordered, and decreed that the said John Glenn be and he is hereby substituted and appointed trustee in the said deed in the room and stead of the said Hoge and Kelly, hereby relieved and removed, and that he be and is hereby clothed with all the rights and powers, and charged with all the duties of executing the trusts of said deed to the same effect as were the original trustees therein. And the said John Blair Hoge and John J. Kelley are authorized and directed to transfer and deliver to the said John Glenn, substituted trustee as aforesaid, all of the books and papers of the said National Express and Transportation Company of every kind and description, and all of the estate and property of said company of every kind and description now in possession of them, the said Hoge and Kelly, or either of them, and the receipt of the said John Glenn to them for the same shall be full acquittance and discharge therefor.

But the said John Glenn is not to take possession of said property, books and papers, or receive any money as such substituted trustee until he, or some one for him, shall enter into *into* bond, with good security, before the clerk of this court, in the penalty of one hundred thousand dollars, conditioned for the faithful discharge of his duties as such trustee.

(6) And the court doth approve and confirm so much of said report of Commissioner O. G. Kean, filed on the 19th day of

June, 1880, as ascertains the debts of said company, and doth adjudge, order and decree that the said National Express and Transportation Company do pay to the said Baltimore and Ohio Railroad Company forty-one thousand two hundred and ninety dollars and sixty-three cents, with interest thereon at the rate of six per cent. per annum from 31st day of October, 1866, till paid; that the said National Express and Transportation Company do pay to the Bank of Commerce (Baltimore) seventeen thousand four hundred and seventy-nine dollars and sixty-eight cents, with interest thereon at the rate of six per cent. per annum from the 4th day of July, 1868, until paid; that it do pay to John W. Wright, sheriff of the city of Richmond, and as such administrator of the estate of William W. Glenn, deceased, forty-two thousand five hundred and thirty-one dollars and thirty-one cents, with interest thereon at six per cent. from the 24th of June, 1870, until paid, and eight dollars and sixty-five cents costs; that it do pay to Francis Murray, for the use of John R. Terry, thirteen thousand six hundred and eighty-three dollars and sixty-seven cents, with interest thereon at six per cent. from the 11th day of March, 1867, until paid, and six hundred and forty-eight dollars and forty-nine cents costs; that the said National Express and Transportation Company do pay to Henry M. Bach, trustee for John O. Reid, Henry R. Robins and Nicholas E. Watkins, eighty-four thousand, eight hundred and thirty-eight dollars and eighty-three cents, with interest thereon at six per cent. per annum, from the 11th day of March, 1867, till paid; that it do pay to Luke H. Miller three thousand seven hundred and forty-eight dollars and eighty-three cents, with like interest thereon from the 19th of September, 1879, until paid, and forty-two dollars and fifteen cents costs; that it do pay to Fulton and Walker five hundred and twenty-seven dollars and thirty-six cents, with like interest thereon from March, 23d, 1867, until paid, and nine dollars and eighty-seven cents costs; that it do pay to Robert Higgins eight hundred and ninety-six dollars and fifty-eight cents, with like interest thereon from April 2d, 1866, until paid, and thirty-seven dollars and seventy-five cents costs; that it do pay to George McMarster seven hundred and thirty-one dollars and ninety-three cents, with like interest thereon from September 1st, 1866, until paid; and that the said National Express and Transportation Company do pay to the several parties hereinafter named, and their legal representatives, the several sums, with like interest thereon, stated in said report as due to said several parties, being each and every claim not hereinbefore specifically mentioned, to-wit: That it do pay to The Pennsylvania Company for Insurance on Lives and Granting Annuities, trustee under the will of Sarah B. Vansyckel, twelve hundred and eighty dollars, with like interest thereon from March 9th, 1867, until paid, and fourteen dollars and eighty-seven cents costs; that it do pay to Gardner T. Getty

sixty-six dollars and three cents, with like interest thereon from November 16th, 1866, until paid, and forty-five dollars and forty-five cents costs; that it do pay to Arthur Shaaff one hundred and sixty-eight dollars and twenty-eight cents, with like interest thereon from December 4th, 1866, until paid, and twenty dollars and seventy-five cents costs; that it do pay to M. B. Poitiaux three hundred dollars, with like interest thereon from Jan'y 31st, 1867, until paid; that it do pay to J. P. McCorkle two hundred and fifty dollars, with like interest thereon from Jan'y 15th, 1867, until paid; that it do pay the Philadelphia, Wilmington & Baltimore R. R. Co. seven thousand seven hundred and thirty-six dollars and seventy-four cents, with like interest thereon from September 13th, 1868, until paid; that it do pay to John J. Kelly two thousand three hundred and eighty-three dollars and forty-seven cents, with like interest thereon from March 1st, 1867, until paid; that it do pay to Louis Stix & Co. five hundred dollars, with like interest thereon from November 15th, 1866, until paid; that it do pay to Burton N. Harrison two thousand eight hundred and fifty dollars, with like interest thereon from June 1st, 1880, until paid; that it do pay to the Wilmington and Weldon R. R. Co. nine hundred and seventy dollars and seventy-three cents, with like interest thereon from September 1st, 1866, until paid; that it do pay to the Richmond, Fredericksburg and Potomac R. R. Co. five thousand three hundred and fifty-three dollars and twenty four cents, with like interest thereon from October 1st, 1866, until paid; that it do pay to the Seaboard and Roanoke R. R. Co. five hundred and ninety-seven dollars and eighty-eight cents, with like interest thereon from Oct. 1st, 1866, until paid; that it do pay to the Potomac Ferry Co. two hundred and ninety dollars and eighty-seven cents, with like interest thereon from October 1st, 1866, until paid; that it do pay to the Northeastern R. R. Co. eight hundred and twelve dollars and twenty-seven cents, with like interest thereon from December 1st, 1866, until paid; that it do pay to South Carolina R. R. Co. four thousand two hundred and thirty three dollars and seventy cents, with like interest thereon from Dec. 1st, 1866, until paid; that it do pay to the Charlotte, Columbia and Augusta R. R. Co., to the Charlotte and South Carolina R. R. Co., eight hundred and eighty-one dollars and twenty-seven cents, with like interest thereon from October 1st, 1866, until paid; that it do pay to the Baltimore Steam Packet Co. three hundred and forty-seven dollars and seventy-six cents, with like interest thereon from November 1st, 1866, until paid; that it do pay to L. R. Smoot seven hundred and seventy dollars, with like interest thereon from August 1st, 1866, until paid; that it do pay to J. T. M. Barnes three hundred and fifty-six dollars and sixty-six cents, with like interest thereon from January 1st, 1867, until paid; that it do pay to General Joseph E. Johnston two thousand four hundred and

seventy-seven dollars and seventy-five cents, with like interest thereon from November 1st, 1866, until paid; that it do pay to Richard T. Allison one hundred and sixty-seven dollars and fifty cents, with like interest thereon from December 4th, 1866, until paid, and eighteen dollars and five cents costs; that it do pay to the Orange and Alexandria R. R. Co. three thousand one hundred and forty-four dollars and seventy cents, with like interest thereon from December 1st, 1866, until paid, and seven dollars and sixty cents costs; that it do pay to Franklin Harrison one hundred and thirty-seven dollars and fifty cents, with like interest thereon from January 1st, 1867, until paid, and twenty-two dollars and sixty cents costs; that it do pay to Andrew J. Joyce & Co. ninety dollars and seventy-six cents, with like interest thereon from October 20th, 1866, until paid and thirty-nine dollars and ninety cents costs; that it do pay to John D. Imboden one hundred and sixty-six dollars, with like interest thereon from May 1st, 1867, until paid; that it do pay to Ould & Carrington, one thousand two hundred and sixty-five dollars and ninety-eight cents, with like interest thereon from January 1st, 1867, until paid; that it do pay to John B. Baldwin one thousand and fourteen dollars and eighty cents, with like interest thereon from Jan'ry 1st, 1867, until paid; that it do pay to Page & Maury one thousand and sixty-one dollars and ninety-six cents, with like interest thereon from January 17th, 1866, until paid; that it do pay to S. D. Childs, seventy-five dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to John Biddle fifty dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to the "National Intelligencer" one hundred and twenty-four dollars and nineteen cents with like interest thereon from June 1st, 1867, until paid; that it do pay to E. R. Cunningham twelve dollars and seventy-five cents, with like interest thereon from June 1st, 1867, until paid, that it do pay to H. P. Gilbert & Co. twelve dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to the publisher of "Chronicle" two hundred and fifty-nine dollars and eighty-eight cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to John Farrall nineteen dollars and forty-eight cents, with like interest thereon from June 1st, 1857, until paid; that it do pay to J. W. Nairu & Bro. sixty-five dollars and twenty-one cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to Thos. Ward & Thos. Kelly thirty-three dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to Palmer & Sly forty-two dollars and fifty cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to Jas. S. Tapham & Co. twenty-nine dollars and thirty-two cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to R. P. Buford twenty dollars and twenty-three cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to

Oscar T. Keeler, one thousand two hundred and forty-two dollars and thirty-four cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to M. W. Hutcheson three hundred and fifty dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to T. Titcomb seven dollars and twenty-five cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to Henry St. Paul & Co. twenty-five dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to James Conning five dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to Edward Shloss two hundred and twenty-nine dollars and eighty-seven cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to Petty & Sawyer six hundred and forty dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to the "Mobile Daily Tribune" thirty-one dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to "Advertiser & Register" one hundred and eighty-seven dollars and fifty cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to Young & Woods two thousand dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to Charles W. Field three hundred and sixty-six dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to Sims & Hamilton thirty-three dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to F. E. Marks two hundred and fourteen dollars and forty cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to R. A. Jeffrey twenty-eight dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to Floyd McCullough fifty-eight dollars and thirty-three cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to C. M. McMullin five dollars and fifty-seven cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to Berger & Hoffman eight dollars and sixty-five cents, with interest thereon from June 1st, 1867, until paid; that it do pay to S. Downey ninety-one dollars and thirty-three cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to S. E. Leps forty dollars and fifty cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to James D. P. Fenton one hundred dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to S. E. Poor eighty dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to Sperdth & Inderriden fourteen dollars and fifty cents, with like interest thereon from June 1st, 1867, until paid: that it do pay to J. C. Orr & Co. six dollars and five cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to Walters & Kraft twelve dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to T. H. Logan & Co. one dollar, with like interest thereon from June 1st, 1867, until paid;

that it do pay to Bushfield, Wallace & Co. one dollar and ten cents, with interest thereon from June 1st, 1867, until paid; that it do pay to J. W. Houck thirty-nine dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to Hamilton & Nagle two dollars, with like interest from June 1st, 1867, until paid; that it do pay to the "Wheeling Intelligencer" forty-one dollars and sixty five cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to the "Wheeling Register" thirty-five dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to John G. Justice one hundred and thirty dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to Thos. K. Davis ninety-two dollars and ninety four cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to J. Reynolds forty-five dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to D. S. Ryan sixty-one dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to Atlantic and North Carolina R. R. Co. five hundred and twenty-five dollars and sixty-seven cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to the Raleigh and Gaston R. R. Co. one thousand one hundred and ninety-five dollars and thirty-three cents, with interest thereon from June 1st, 1867, until paid; that it do pay to C. W. Starbuck & Co. thirty dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to Fitch & Bro. seventeen dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to D. McFarland ten dollars, with like interest thereon from June 1st, 1867, till paid; that it do pay to J. W. Newman six dollars, with like interest thereon from June 1st, 1867, till paid; that it do pay to E. Raine two dollars, with like interest thereon from June 1st, 1867, till paid; that it do pay to Brown & Davis nineteen dollars and fifteen cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to Sam'l Blair & Co. twenty-six dollars and sixty cents, with like interest thereon from June 1st, 1867, till paid; that it do pay to F. E. Snire & Co. thirteen dollars and eighty-two cents, with like interest thereon from June 1st, 1867, till paid; that it do pay to C. B. Prather & Co. ten dollars and seventy-five cents, with like interest thereon from June 1st, 1867, till paid; that it do pay to Maguire & Co. six dollars and twenty cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to Anderson & McFarland eleven dollars and ninety-one cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to Wm. Huddart & Co. three dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to J. B. Schroder three dollars and seventy-five cents, with like interest thereon from June 1st, 1867, until paid; that it do pay H. G. Strobel five dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to the Western Union Telegraph

Company one hundred and fifty dollars, with like interest thereon June 1st, 1867, until paid; that it do pay to John M. Owen eight dollars and fifty cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to Smith, Hawley & Co. thirty-five dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to J. Black sixteen dollars and sixty-seven cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to Capatinus Shaffer six dollars and twenty-five cents, with like interest thereon from June 1st, until paid; that it do pay to R. B. Smith forty dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to Peter Hoffman nine dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to J. Taylor ten dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to P. Doherty twenty dollars, with interest thereon from June 1st, 1867, until paid; that it do pay to John Taylor ten dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to John Dean twenty-two dollars and fifty cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to C. D. B. Webster eighty-three dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay W. H. Glenn seventy-five dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to E. Winchester sixty-nine dollars and thirty-four cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to J. J. Graham eighty dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to J. L. Hawk forty-seven dollars and eighty-three cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to R. C. Kinkead one hundred and ten dollars and eighty cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to Sherman Bailey thirty-five dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to Earhart Bumans forty dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to John Murphy twenty dollars and eighty three cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to F. W. Winchester twenty-five dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to William Grimes forty dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to E. Shaffer fifty dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to G. H. Swift fifteen dollars, with interest thereon from June 1st, 1867, until paid; that it do pay to H. M. Cottingham five hundred and eighty-five dollars and sixty-six cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to J. H. McDade one hundred dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to F. A. B. Jennings fifty-six dollars and sixty-six cents, with like interest thereon from June 1st, 1867, until paid;

that it do pay to R. W. Atwell seventy-five dollars, with like interest thereon from June 1st, 1867, until paid, that it do pay to P. S. Johnson one hundred and eight dollars and thirty-three cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to R. M. Demere ninety-five dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to H. C. Grubb one hundred and thirty-one dollars and sixty-five cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to Hunter & Gammel three hundred and eighty-four dollars and eighty-eight cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to A. H. Coutes thirty dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to J. H. Nicholas ninety dollars and sixty-two cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to C. M. Davis six dollars and seventy cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to J. T. Jenkins & Co. sixteen dollars and sixty cents, with interest thereon from June 1st, 1867, until paid; that it pay to C. W. & W. R. J. Long & Billups fifty-nine dollars and forty-one cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to J. J. Ford fifty-two dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to Ogletree & Grubb fifty-two dollars and seventy-five cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to S. S. Herman sixty-seven dollars and thirty-five cents, with like interest thereon from June 1, 1867, until paid; that it do pay to J. A. Witherspoon sixty-six dollars and ninety cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to the town of Athens, Ga., twenty-two dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to Mrs. C. A. Johnston three hundred and fifteen dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to E. R. Hodgson & Bro. twenty-three dollars, with like interest from June 1st, 1867, until paid; that it do pay to Nicholson, Moss & Hutcheson seventy-five dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to James Bond one hundred and thirty-five dollars, with like interest thereon from June 1st, 1867, till paid; that it do pay to Stockton & Co. ninety-six dollars and eighty-seven cents, with like interest thereon from June 1st, 1867, till paid; that it do pay to F. Arnold & Co. one hundred and thirty dollars and seventy-five cents, with like interest thereon from June 1st, 1867, until paid: that it do pay to G. A. Mercer twenty-five dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to Roswell King one hundred dollars and fifteen cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to the Alabama and Florida R. R. Co. two hundred and fourteen dollars and thirty-seven cents, with like interest thereon from June

1st, 1867, until paid; that it do pay to the Mobile and Great Northern R. R. Co. one hundred and fifty-five dollars and eighty-two cents, with like interest thereon from June 1, 1867, until paid; that it do pay to the Selma and Meridian R. R. Co. one hundred and seventy-four dollars and eighty-nine cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to W. M. Keblinger ninety-five dollars and fifty cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to W. J. Keblinger one hundred dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to J. L. Brode one hundred and thirty-four dollars and fifteen cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to Edwin W. Wade thirty-seven dollars and sixty-six cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to J. J. Terrill two hundred and ninety-one dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to J. B. Rhea forty dollars and ninety-one cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to Margaret W. Day two hundred and seventy-four dollars and ninety-eight cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to the Richmond and Danville R. R. Co. four thousand eight hundred and twenty-three dollars and eighty-one cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to the Virginia Central R. R. Co. one thousand nine hundred and sixty-eight dollars and forty-three cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to the Richmond and Petersburg R. R. Co. three hundred and fifty-one dollars and nineteen cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to the Petersburg R. R. Co. four hundred and six dollars and eighty-two cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to "Richmond Dispatch" one hundred and sixty-nine dollars and eight cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to the "Richmond Times" seventy-five dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to the "Richmond Enquirer" one hundred and twenty-one dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to the "Va. Free Press" twenty dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to the "Winchester Times" twelve dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to the "Winchester News" ten dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to L. H. Fitch thirty-six dollars and ninety-five cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to E. W. Anderson fifty dollars, with like interest thereon from June 1st, 1877, until paid; that it do pay to the State of Virginia for taxes,

five hundred and sixteen dollars and seventy-two cents, with like interest thereon from June 1st, 1867, until paid; that it to pay to city of Richmond for taxes, one thousand dollars, with like interest thereon from June, 1st, 1867, until paid; that it do pay to Warwick & Barksdale fifty-four dollars and fifty cents, with like interest from June 1st, 1867, until paid; that it do pay to K. K. Douglas ten dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to D. T. Richards fifty dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to J. B. Taylor five dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to Merwin & Simpkins ten dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to L. A. Elliott ninety-four dollars and fifty cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to Benton H. Martin one hundred and sixteen dollars and seventy-five cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to N. W. Belcher & Co. two hundred dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to Stephen Lane two hundred and fifty-five dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to H. Danford nine dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to Abernathy & Co. ninety-two dollars and thirty-seven cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to E. & H. F. Andrews & Co. three hundred and fifty-five dollars and forty-one cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to Thomas Chalmers one hundred and twenty-two ——— and fifty cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to A. M. Hays & Co. thirty-five dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to T. Frank & Co. one hundred and twenty-three dollars and fifty cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to Gorden & Slater nine dollars and seventy-five cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to Richardson & Co. twenty-three dollars and seventy-six cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to Joseph Schneider fifty dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to R. Ibbotson, Pres't, &c., one hundred and ninety-one dollars and eleven cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to D. Appleton & Co. fifty-seven dollars and seventy-nine cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to J. H. Foote one hundred dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to E. J. Houseman fourteen dollars and fifty cents, with like interest thereon from June 1st, 1867, till paid; that it do pay to W. S. Walker seventy-five dollars, with like interest thereon from

June 1st, 1867, till paid; that it do pay to R. Hendricks two hundred and fifty dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to M. G. Farrh one hundred and twenty-nine dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to A. Cudworth seventy-six dollars and twenty-six cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to S. D. Easterly ninety-three dollars and seventy-five cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to W. S. Depanssure three hundred dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to Hiram Harris three hundred and ninety-three dollars and seventy-five cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to Cameron, Barclay & Co. thirty-seven dollars and fifty cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to Caustens & Jacobs seventeen dollars and fifty cents, with like interest thereon from June 1st, 1867, till paid; that it do pay to Geo. D. Ladd & Co. eighty dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to Sawner & Ferguson eighty-three dollars and fifty cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to C. D. Franke six dollars and twenty-five cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to Wm. Brookland sixty-three dollars and ninety cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to Evans & Cogswell three hundred dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to Benj. M. Innes twenty-two dollars and fifty cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to S. P. Wiltbank five hundred and ninety-five dollars and ninety cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to C. J. Wiltbank two hundred and eighty-five dollars and fifty cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to Wm. Wyman one hundred and thirty-five dollars and twenty-five cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to P. Dougherty one hundred and twenty-seven dollars and twenty-five cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to Thos. P. Bacon two hundred and forty dollars and eighty-five cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to Wm. C. Ford ninety dollars and ten cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to A. T. Lavallette fourteen dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to C. C. Thompson sixty dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to David Bulst sixty dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to H. D. Basler twenty-one dollars and fifty-five cents, with like interest thereon

from June 1st, 1867, until paid; that it do pay to Benj. Flood seventeen dollars and fifty-eight cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to Edward Beans thirty-eight dollars and thirty-two cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to H. Montgomery twelve dollars and two cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to B. N. Oakman twenty-five dollars and fifty-five cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to John H. Maxwell nine dollars and fifty cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to James Millman ten dollars and fifty-two cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to Fred. Nagle twenty dollars and thirty cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to Oglesby & Hodge seventy-six dollars and sixty-eight cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to James M. Cooper forty-nine dollars and twenty-five cents, with like interest from June 1st, 1857, until paid; that it do pay to McCaudless & Smith fifteen dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to Tucker & Sapman six hundred and forty-seven dollars and fifty-nine cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to Weinstein & Bro. twenty-four dollars, with interest thereon from June 1st, 1867, until paid; that it do pay to McCall & Monteith twenty-nine dollars and sixty-eight cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to Fulton & Wilkes sixty-one dollars and one cent, with like interest thereon from June 1st, 1867, until paid; that it do pay to Philip L. Justice ninety dollars and eighty cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to Andrew Johann & Co. six dollars and six cents, with like interest thereon from June 1st, 1867, until paid: that it do pay to C. L. Cadwallader one hundred and thirty-two dollars and seventy-five cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to Warner & Co. thirty-nine dollars and ninety cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to E. Katterlmas twenty-eight dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to James J. Martin two hundred and eighty-two dollars and twenty-five cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to William Mann forty-one dollars, with interest thereon from June 1st, 1867, until paid; that it do pay to R. McClure fifty dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to James B. Smith & Co. one hundred and sixty-six dollars and forty-four cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to H. B. & A. Taylor one hundred dollars, with like interest thereon from June 1st, 1867, until paid; that

it do pay to Tryon Bros. & Co. two hundred and fifty-nine dollars and eighteen cents, with like interest thereon from June 1st, 1867, till paid; that it do pay to S. Bonaffon two hundred and seventy-nine dollars and thirty cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to Powers & Weightman one hundred and thirty-two dollars and fifty cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to Boughman, Thomas & Co. twelve dollars and twenty-five cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to Thos. B. Eaton & Co. two dollars and eighty-five cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to A. A. Laws thirty-five dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to F. A. Goddard, twenty-seven dollars and ninety-three cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to Dickerson & Robelen fifty-one dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay W. A. Wisdom four dollars and fifty cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to Underwood & Conner fifteen dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to J. P. Smith eighteen dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to Wm. McCauley twenty-five dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to Williamson & Co. one hundred and eighty dollars and nineteen cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to Louis Green eighty dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to C. H. & M. House ninety dollars, with like interest thereon from June 1st, 1869, until paid; that it do pay to Hollingsworth Warfield five thousand one hundred and seventy-one dollars and thirty-six cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to the Baltimore Gaslight Co. one hundred and fifteen dollars and forty-six cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to Herman Born thirty-two dollars and twenty-five cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to Adam Kahler ninety-one dollars and eighty-five cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to Gibson & Kirk thirty-six dollars and forty cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to "Baltimore Sun" twenty-eight dollars and twenty-five cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to Henry Roth twenty-three dollars and twenty-five cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to Bibb & Co. two dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to Fred'k Oelmann fourteen dollars and sixty-six cents, with like interest thereon from

June 1st, 1867, until paid; that it do pay to L. Green one hundred and twelve dollars and twenty cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to Caulfield Bros. & Co. three hundred and seventy-three dollars and sixty-six cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to Burton and Irving thirty-one dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to Andrews & Thompson sixteen dollars and eighty cents, with like interest thereon from June 1, 1867, until paid; that it do pay to George Brown forty dollars and forty-one cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to Geo. W. Webb & Co. twenty-five dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to Hodges Bros. thirty-six dollars and sixty cents, with like interest thereon from June 1, 1867, until paid; that it do pay to Cushings & Bayly thirty-one dollars and sixty-two cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to Schwardtman & Co. twenty-nine dollars and thirteen cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to Rudolph Oehl eighty-eight dollars and thirty-three cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to Daniel Seaton one hundred and fifteen dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to John Watkins twenty-one dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to A. J. Smith sixty dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to McC. Y. Barry one hundred and thirty-nine dollars and twenty-three cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to W. A. C. Bayly sixty-two dollars and fifty cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to Stephen Cremin thirty-two dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to George Bishop thirty dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to G. A. Schwartzman forty-three dollars and eighty-eight cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to F. B. Berkley one hundred and fourteen dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to Milton Bull one hundred and fifteen dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to Henry Vaughan fifty dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to George Bond fifty-seven dollars and five cents, with like interest thereon from June 1st, 1867, until paid;. that it do pay to Andrew O'Meara forty-five dollars and fifty-seven cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to James Hood twenty-four dollars and fifty-six cents, with like interest thereon from June 1st, 1867,

until paid; that it do pay to W. H. Tibals thirty-four dollars and sixty-eight cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to Edward McGeehan fifty-seven dollars and eighty-four cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to F. Grill nineteen dollars and twenty-five cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to Jacob Arnold thirteen dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to John Manly twenty-three dollars and fifty-seven cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to Thos. McCullough twenty-five dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to Thos. Burns twenty-five dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to A. Boyce twenty-eight dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to F. Craig ten dollars and eighty cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to J. Schleiffer seven dollars and ninety-four cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to W. F. Anderson seventeen dollars and fifty cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to George McAllister eighteen dollars and fifty cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to S. Bishop eleven dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to Martin Clark ninety-two dollars and seventy-three cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to George Clark sixty-three dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to S. S. Mann one hundred and sixteen dollars and twenty cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to H. Frank & Co. twenty-four dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to Mrs. S. C. Ricketts twenty dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to C. E. Needles eight dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to E. Whitman & Sons ten dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to J. H. Walzl thirty nine dollars and twenty-two cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to McDowell, Robinson & Co. one hundred and fifty-six dollars and fifty cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to John T. Watkins fourteen dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to Hill & Mitchell seventeen dollars and sixty-nine cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to R. Sinclair & Co. thirty-three dollars and ninety cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to

Boerman and Littlebaum thirty-nine dollars and twenty-seven cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to Weiglin & Heilner eleven dollars and eighty-two cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to Walter S. Moore & Co. twenty-six dollars and seventy-six cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to J. W. Ebert & Co. seven dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to Thomas D. Johnston twelve hundred and seventy-four dollars and forty-one cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to Bolton Brothers seventeen dollars and fifty cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to David Anderson sixty-seven dollars and seventy-five cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to W. H. Oler nineteen dollars and fifteen cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to Kelly & Piet two thousand two hundred and twenty-two dollars and forty-seven cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to "Evening Transcript" one hundred and sixteen dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to Montgomery, Slade & Co. six dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to Edward Sinn three dollars and fifty cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to P. P. Pendleton one hundred and six dollars and fifty cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to J. A. Pierce one hundred and fifty-five dollars and fifty-five cents, with like interest thereon from June 1st, 1837, until paid; that it do pay to D. Claude twenty-five dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to W. H. Glannett thirty-six dollars and twenty-five cents, with like interest thereon from June 1st, 1897, until paid; that it do pay to Hild, Wammelle & Mitchell four dollars and forty-five cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to R. H. Tall four dollars, with like interest thereon from June 1st, 1867, until paid; that it do day to James T. Ball fifteen dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to John Nugent seventy-five dollars and sixty-nine cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to A. S. Abell & Co. twenty-one dollars and forty-two cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to Ammidon, Cranbie & Co. sixteen dollars and twenty-six cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to G. C. Taliaferro seventy-five dollars, with like interest thereon from June 1st, 1867, until paid. that it do pay to C. M. Davis seventy-one dollars and sixty-six cents, with like interest thereon

from June 1st, 1867, until paid; that it do pay to C. Yengling three hundred and fourteen dollars and eighty-five cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to Thos. Dobbins seventy-five dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to W. H. Gordon twelve dollars and fifty cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to R. A. Crawley one hundred and sixty-five dollars, with like interest thereon from June, 1st, 1867, until paid; that it do pay to Edward L. Clark fifty-six dollars and twenty-two cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to A. N. Stewart one hundred and twenty dollars and fifty cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to Thos. H. Cook one hundred and forty-nine dollars and fifty cents with like interest thereon from June 1st, 1867, until paid; that it do pay to Benj. P. Grymes sixty dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to W. L. Keller one hundred and forty-one dollars and ninety-seven cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to Geo. Walters ninety-five dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to A. J. Smith one hundred dollars, with like interest thereon from June 1st, 1867, until paid; that it do pay to H. Heth three hundred and seventy-three dollars and sixty-six cents, with like interest thereon from June 1st, 1867, until paid; that it do pay to W. D. Miller one thousand one hundred and thirty-six dollars and twenty four cents, with like interest thereon from June 1st, 1867, until paid; and the court, without at this time specifying or determing the order of priority in which said debts due by the said National Express and Transportation Company shall be paid out of any property and assets conveyed by the said deed of trust of the 20th day of September, 1866, but expressly reserving all such matters for future consideration, doth adjudge, order and decree that the several classes of debts secured in and by said deed be paid in the order of priority in which it shall hereafter appear, upon inquiry, they are preferred, if such inquiry shall become necessary and proper.

And it appearing to the court that the calls for subscriptions heretofore made by the said company, amounting to twenty per cent., have been exhausted, or are now unavailing, and that the said company has now no property or assets out of which said debts or any part of them can be made, except the uncalled-for and unpaid subscriptions to the capital stock, amounting to eighty per cent., the right to receive and collect which, according to the contracts of subscription, as well as the former calls, was conveyed and assigned in trust as aforesaid, and constitute a trust fund in the hands of the

subscribers, which is primarily liable for the debts of the company; and it further appearing that the court, that by the second and fourth clauses of said deed of trust, the trustees therein named were clothed with ample authority and power to collect, by suit or otherwise, all of the debts, claims and moneys payable to said company, which were assigned by said deed; and it further appearing to the court, that on account of death, removal, insolvency, and other causes, much of said uncalled-for and unpaid subscriptions has been lost, and great difficulty has been encountered in realizing what remains good from stockholders scattered in and among so many different and distant localities and states, and that it is necessary and proper that at least thirty per cent. of said subscriptions be now called for and required, in order to meet the debts of said company and the costs and expenses of collecting and administering said fund. And it further appearing to the court that the said company has long since ceased and abandoned its business, and that for about fourteen years there has been no meeting either of the stockholders or of its board of directors, it is adjuged, ordered and decreed that a call and assessment be, and the same are hereby made upon the capital stock and stockholders of the said National Express and Transportation Company of thirty per centum of the par value of said stock, being thirty dollars on each and every share thereof, and that the stockholders of said company, and each and every of them and their legal representatives and assigns, be, and they are hereby, severally required to pay the several amounts hereby called for and assessed to the said John Glenn, of the city of Baltimore, in the state of Maryland, substituted trustee in said deed of trust from the said company, of the 20th day of September, 1866; and the said trustee is hereby authorized and directed to collect and receive the said call and assessment, and to take such prompt steps to that end, by suit or otherwise, and in such jurisdictions, as he may be advised; and if the amount realized from this call and assesament shall prove to be insufficient for the purposes of this decree, liberty is reserved to the said creditors and the said trustee to move the court for such further assessment as may be necessary and proper.

And after paying the necessary and proper costs and expenses of executing this decree, the said trustee is directed to deposit his collections in the Planters' National Bank of Richmond, to the credit of the court in this cause, or in such other bank as may, from time to time, be designated by the court, and to file the certificates of such deposits with the clerk of this court; and said trustee will make report to the court, from time to time, of his proceedings under this decree, and will settle his accounts, from time to time, before one of the master commissioners of this court, not permitting any six months to intervene between such settlements, and

such commissioner is directed and required to make report to the court of such setlements as soon as made.

And upon the coming in of such report, as soon as sufficient sums shall be collected, the court will take order as to the proper distribution of the fund among those entitled thereto.

The answer of John Blair Hoge and John J. Kelly, referred to in foregoing decree of Dec'r 14th, 1880, is in the words and figures following, to-wit:

Answer.

John W. Wright, sheriff, &c., and as such administrator of W. W. Glenn, who sued, &c., against John Blair Hoge and John J. Kelly, impleaded with the National Express and Transportation Company, and others,	In the Chancery Court of the city of Richmond, Va.

The separate and several answer of John Blair Hoge and John J. Kelly, as surviving trustees, named with others as defendants in the bill of complaint, originally filed by Wm. W. Glenn as complainant, now deceased, respectfully shows to the court as follows:

These defendants, now and at all times hereafter, saving and reserving to themselves all manner of benefit and advantage of exception to the many errors and insufficiencies in the complainant's said "bill of complaint contained for answer thereunto, or to so much or such parts thereof as said defendants are advised is material for them to make answer unto, answer and say that these said defendants deny each and every allegation in the complaint made, except such as hereinafter specially admitted.

The said defendants admit that the complainant, William W. Glenn was, and that his legal representative now is, one of the creditors of said, The National Express and Transportation Company, in the bill of complaint mentioned.

And said defendants admit that said National Express and Transportation Company was duly incorporated by the legislature of the State of Virginia on the —— day of ——, 1865, as in that behalf is alleged in the bill of complaint.

And said defendants admit further, that said company accepted said act of incorporation, and proceeded to conduct its business in pursuance thereof until the 20th day of September, 1866, when said company having become much embarrassed in its affairs, and owing large debts to various persons, made and executed a deed of trust for the benefit of its creditors to these defendants, John Blair Hoge and John J. Kelly (and to one C. Oliver O'Donnell, who is

named as a defendant, but who, as these defendants are informed, and believe, is now dead), dated the 20th day of September, 1866, which thereafter to said trustees was duly delivered, and which was duly recorded in the city of Richmond, in the city of Baltimore and elsewhere, as is in the bill of complaint in that behalf alleged.

And said defendants admit further that the assets of said company, to which its creditors have to look mainly for the payments of their debts, consist now only of the amounts contracted to be paid by the subscribers to its capital stock, as in the bill of complaint in that behalf is alleged.

And said defendants admit that the total number of shares of the stock of said company which had been subscribed for at the date of said assignment was about $40,044, each share being of the par value of $100, and said subscriptions representing the aggregate of about $4,004,400, and that on the 29th day of October, 1866, the condition of said company, with reference to its stock and debts, was and was reported at a meeting of stockholders, as in the bill of complaint in that behalf is alleged.

And said defendants admit that the subscribers to the capital stock of said company resided, and now reside, in many states, and not within the jurisdiction of any one court;—

And that by the terms of the subscription the subscribers were bound to pay the amount of said subscription as and when the same should be called for by said company;—

And that the total amounts of assessments or calls made by said company upon its stockholders was twenty per cent. of the amount of the subscriptions; and that the amounts paid in money or by notes upon said calls of twenty per cent. are correctly set forth in the bill of complaint;—

And that a very small part of the said assessments to the amount of twenty per cent. which remained unpaid at the date of said report has been since paid or collected from the delinquent stockholders;—

And that no subsequent call or assessment was made upon its stockholders by said company, and that eighty per cent. of the amount of said subscriptions remain uncalled for and unpaid;—

And that said trustees were not requested to take possesion of said trust estate, under said deed, until on or about the 3rd day of November, 1866, and that in the meantime nearly all of the visible property of said company had been levied upon and taken under legal process by its creditors, and that the amount of the same was wholly insufficient to pay the debts of said company.

And that said company had hypothecated, or otherwise used and parted with a considerable amount of the notes and other obligations received by it from stockholders on account of amounts due by them on said calls, and that the actual amount of money realized and received by said trustees under said assignment, was not sufficient

to pay the debts due the preferred creditors of the first class mentioned in said deed of trust.

And, that of the amount of the said assessments upon the subscribers of twenty per cent., a large part cannot be collected at all, by reason of the insolvency of the subscribers, and that a large part of said assessments has been lost by lapse of time, and cannot now be collected.

And, that as to the debts due upon said unpaid assessments, said trustees have been hindered and delayed in the collection of the same by adverse litigation in the state of Maryland and in the state of New York, and in other states; and, that the right of said trustees to receive and collect the debts due the company by subscribers on said assessments has been called in question in some of the suits, and validity of said deed of trust has been disputed.

And, that in some of said suits, said trustees have been enjoined from proceeding to collect the debts due said company, and said trustees have thus far been able to collect very little of said debts by reason of the difficulties interposed by said litigation.

And that the debts due said company and which ought to be applied in payment of its creditors, are either now lost in a great part or are in danger of being lost, and are not now available for the payment of said creditors.

And, that even if said trustees can surmount the embarrassments and difficulties which have prevented them hitherto from realizing said assets, the amount which can be realized from all the property which passed to such trustees, and, which could, under any circumstances, be realized by them, would be entirely inadequate to pay the just debts of said company.

For that, as said defendants are advised by the true construction of said deed of trust, no part of the eighty per cent. of subscriptions to said capital stock, which had not been called for by said company from its subscribers, passed to said trustees, nor any power to sue for or to collect said subscriptions so uncalled for, but that the relations between said company and its subscribers and their legal rights and obligations as to said uncalled for part of said subscription, remained unaffected by said deed of trust.

And said defendants are advised that under said deed of trust said trustees acquired no right to sue a subscriber for his subscription to said stock, except to the extent that said company could sue such subscriber; and said defendants are advised that said company could not sue one of its subscribers for his subscription, unless and until said company has first made an assessment or call upon such subscriber therefor. And said defendants are advised that, allowing said deed to have full legal validity elsewhere and allowing said trustees to proceed without impediment to collect all the debts due the company collectable by them, the pro-

visions of said deed of trust are wholly inadequate to provide for the payment of the debts of said company, many of whose creditors are in very needy circumstances, and nearly all of whom have waited nearly fourteen years for the satisfaction of their just demands.

And said defendants are advised that if said company were now to levy an additional assessment upon its stockholders, it is doubtful whether the right to sue for and collect such assessments would vest in said trustees under said deed; and in attempting to collect the same, said trustees would meet with this additional embarrassment, besides those which have attended their efforts to collect the calls already made and unpaid at the date of said deed, and which were intended to be conveyed to them by said deed.

And said defendants are advised that if it be held that any new call to be made by said company would not pass to said trustees, and they would not for any reason be entitled to collect the amount thereof, but that the amount of such calls would be due to the said company by the stockholders, it would lead to ruinous and disastrous consequences, inasmuch as the creditors of said company would endeavor to reach the amounts due to said company under such additional call, from its solvent stockholders, and much thereof would be lost in the expenses of litigation, and an equitable and just division thereof among the creditors would be wholly defeated, as said defendants are advised that a large part of the debts of said company are too small to justify the holders of them, who are poor men, in entering upon such a race of diligence.

And said defendants are advised that it will be necessary to resort to the residue of said subscriptions in order to provide the requisite means to pay the debts of said company, and that said subscriptions, so far as the same are unpaid, constitute a trust fund for the payment of the debts of said company, and that the same can and ought to be collected and so applied.

And that, inasmuch as the stockholders reside within different jurisdictions, it is impossible for the creditors to make them all defendants in any one court and compel an equitable contribution from them, to raise a fund sufficient to pay the debts of said company.

And that to proceed against the stockholders who are within the jurisdiction of each court would increase litigation, and would lead to other injurious consequences. For said defendants are advised that should the creditors proceed against the stockholders within the jurisdiction of any one court, they would be entitled to compel said stockholders to contribute to the extent of their unpaid subscriptions, without reference to the contribution that should be made by other stockholders not within said jurisdiction, and would force those so compelled to contribute to resort to stockholders

elsewhere for contributions and indemnity, and thus greatly multiply litigation and expense.

And the said defendants are advised that in view of the diff—ulties and embarrassments which have attended the efforts of said trustees to collect so much of the debts of said company as was intended to be conveyed to them by said deed of trust, and in view of the further and additional difficulties that would attend any attempt on the part of said trustees to collect any new call to be made by said company, and in view of the ruinous expense, loss and injustice that would attend an attempt on the part of said company to collect such new calls as debts due to itself, and in view of the necessity there is that resort must be had to the subscribers to provide means for paying the debts of said company, and in view of the expense, multiplicity of litigation, and other difficulties that would attend the proceeding of the creditors against said stockholders direct in the different states and jurisdiction in which said stockholders reside, and in view of the unquestionable right of said creditors in some form to compel payment from said stockholders, the said creditors are entitled to the interposition of a court of equity for their relief.

And said defendants are advised that said creditors are entitled to have an account taken of the debts of said company, and of the assets now available for the payment of the same, other than the unpaid subscriptions, and that they are entitled to have an ascertainment of the amount of said uncalled for and unpaid subscriptions which will be required to provide means for the payment of the debts of said company in full, and that in ascertaining the amount so required, a proper allowance should be made for probable losses by reason of insolvency of stockholders and otherwise, and for the expenses of collecting the same and for the expenses of this proceeding, and to have a decree requiring said company to make a call or assessment upon its stockholders, sufficient to provide said necessary amount, and to have the debts created by such call placed in the hands of some person or persons to be appointed by this court, with adequate authority and power to sue for, collect and receive the same, and bring the same into this court to await its further order.

And said defendants admit that before the questions relating to the powers, rights, and obligations of said trustees under said deed of trust can be finally decided, there is imminent danger that a large part of the said subscriptions to the stock of said company may be lost by the insolvency of the subscribers and other causes.

And that the creditors are entitled to have said deed of trust pronounced upon and construed by this court, and to have the powers and duties of the trustees thereunder, and the rights of the creditors ascertained and defined.

And said defendants are advised that, as said company is a Virginia corporation, and as said deed of trust conveys nothing but personal property, whatever force and effect may be given to the same by the law of this State will be respected and enforced in the courts of other States when said deed may be drawn in question.

And, so said defendants are advised, that the creditors of said company are entitled to have the judgment of this court as to the validity and scope of said deed of trust under the laws of Virginia.

And said defendants admit that there has not been recently any election of officers by said company, but said defendants are advised that under its charter and the laws of Virginia the officers of said company last elected remain such officers until the election and qualification of their successors, and are competent to exercise the powers of such officers.

And said defendants are further advised that under the laws of Virginia the corporate franchises of said company and its existence as a corporation continue in full force and effect until the affairs of said company shall have been fully settled and its debts paid.

And said defendants adm it that William H. Perot, of Baltimore, is the president of said company, —— ——, of ——, is the vice-president thereof, and that the board of directors thereof are William Devries and D. J. Foley, of Baltimore; M. G. Harman, of Staunton, Virginia; Joseph R. Anderson, of Richmond; F. P. Zimmerman, of Augusta, Georgia; J. Carter Marbury, of Washington, D. C.; Wm. H. Webb, of New York city, and Lorenzo Norvell, of Lynchburg, Virginia, or that such of said persons as are now living, constitute said board of directors.

Further answering (the defendant, Hoge, herein answering upon information and belief only) these defendants allege and show to the court that said The National Express and Transportation Company continued to carry on its regular and usual express and transportation business for some time after the execution and delivery to said trustees of said deed of trust of September 20th, 1866; that the defendant, Kelly, was theretofore and in the year 1866 the vice-president of said The National Express and Transportation Company, and that in or about the month of August, 1866, the defendant, Kelly, was appointed to be the general superintendent of said company, thereafter having and exercising general charge of and supervision over the affairs and business of said company; that as such officer of the company, and in one or the other of said capacities, the defendant, Kelly, had, during the time the company was carrying on a general transportation business, frequent and free access to and use of the books of the company kept, whether at the principal office of the company or at its branch offices, and in fact frequently saw and consulted many or all of said books; that until in or about the month of

November, 1866, the said books were in the charge and custody of the several officers or employees of the company whose duty it was to keep and write up such books respectively; that in or about the month of ———, 1866, such of said books as show the liabilities and assets of the company, the list of subscribers to the capital of the company, the shareholders of the company, the minutes of the proceedings of meetings of shareholders or directors of the company, the assessments levied upon the subscribers or shareholders, the amounts of such assessments paid in, and who made such payments, and generally the books and papers needed by any one who would attempt to enforce against subscribers or shareholders the liabilities of the company, passed into the charge and custody of the late Thomas G. Pratt, of Baltimore city, Maryland, who had been theretofore appointed, by decree of a Maryland court, to be receiver of the assets, &c., of said company; that said books, as these defendants are informed and believe, remained in the charge and custody of said receivers until in or about the month of ———, in the year 1867, when said decree of the Maryland court was revoked and vacated and said books were surrendered and delivered to the defendant Kelly, in whose charge and custody they have ever since remained and been in the city of New York; *New York;* that said defendant, Kelly. has never heretofore afforded or authorized the use of, or any access to, said books or papers, or any of them, to any creditor of the company, or to any other person whatever except the attorney and counsel of said trustees, and the attorney and counsel of the said company in the city of New York, who was, as these defendants are are informed and believe, heretofore duly elected and retained by the company in and about the various litigations in which the company has, since the autumn of the year 1866, been a party in New York, and who has remained to this day the attorney and counsel for the company, and in charge of such litigations in the company's behalf in New York, and that as far as these defendants know, or are informed, no creditor of the company has in fact consulted, had access to, or seen the said books or papers, or any of them, since they came into the custody of the defendant, Kelly, as aforesaid.

Further answering, these defendants show to the court that many and various proceedings, chiefly in the courts of Maryland, or in the courts of New York, have (in which states a large part, if not the larger part, of the outstanding shares of said company are held), since the 20th day of September, 1866, been conducted by the company, and by the said trustees, at a large expense for counsel and otherwise, in the effort to establish the rights of the company and of the trustees against persons indebted to the company, but that, in New York, there is an injunction yet in effect issued by the supreme court of that

state, enjoining both the company itself and the said trustees from collecting any debts, whatever, due to the company in that state, the action in which said injunction was granted having been brought by one of the shareholders in his own behalf and in behalf of all others, and the same being now still pending, whilst the trustees are without funds to defray the further expenses of counsel and otherwise, which will be necessarlly incurred in and by further proceedings in that suit, in which the officers of the company have heretofore and for several years held aloof, and afforded the trustees no assistance whatever; and that the situation in Maryland and in other states is, as these defendants are informed and believe, very similar to that in New York, no practical success having as yet been had in efforts to collect the amounts due the company or the trustees by debtors residing there—the officers of the company doing nothing for the benefit of the creditors of the company, and the trustees themselves being without funds to continue in active performance of their trust, in the teeth of the determined and alert opposition of the company's shareholders everywhere to, and any and every attempt heretofore made to compel them to meet and liquidate their liabilities.

Further answering, the said defendants, John Blair Hoge and John J. Kelly, the surviving trustees as aforesaid. say what they have, and each of them, separately for himself, says that he has no money belonging to said company, or to any creditor of said company, now in possession or under control, and that they have no other property of said company in possession or under control, *except that* the defendant Kelly has, as aforesaid, custody and charge of certain books and papers of the company hereinbefore mentioned or referred to; and that any account which may now be rendered or stated by these defendants would show these defendants are themselves out of pocket in the effort to perform the said trust, each of these defendants having necessarily expended in the said efforts to perform his duties as such trustee, an amount of money considerably in excess of any and all the inconsiderable moneys he has been able to collect under said deed of trust—the great body of the debts of the company remaining meantime unpaid.

And these defendants submit to this honorable court that all and every the matters in the said complainant's bill mentioned and complained of are matters which may be tried and disposed of at law, &c., &c.

And these defendants deny all unlawful combinations and confederacy in the said bill charged—without that, &c., &c.

State of Virginia:

John J. Kelly, being duly sworn, says that he is the defendant of

that name in the action above entitled, and is one of the trustees named in said deed of trust; that he has read the foregoing separate answer made by him and by the defendant, John Blair Hoge, as surviving trustees, to the complainant's bill, and that he knows the contents thereof; and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

Sworn to before me this 26th day of April, 1880.

O. G. KEAN, N. P.

The answer of John Blair Hoge, referred to in foregoing decree as filed Dec'r 14th, 1880, is in the words and figures following—to-wit:

ANSWER OF J. B. HOGE.

The answer of John Blair Hoge, trustee, to an original and an amended and supplemental bill filed against him and others by W. W. Glenn, &c., suieng, &c., against the National Express and Transportation Company and others in the chancery court of the city of Richmond.

This respondent, saving, &c., for answer, says that he adopts in the main the answer of his co-defendant and trustee, John J. Kelly; that he is now a judge of one of the circuit courts of the state of West Virginia, and is so situated that he could not give active and personal attention to the business involved in this litigation and is willing to resign his trust, and does hereby resign it, if deemed necessary and proper by the court; but that he is willing, nevertheless, if the continuance of his trusteeship should be considered advantageous to the ends of justice in attaining the objects of the suit, to allow his name to be used as such trustee and to perform such active duties of his trust as may not be incompatible with his judicial duties as one of the judges of the circuit court of West Virginia.

And now having fully answered, &c., this respondent prays to be hence dismissed, &c.

JOHN BLAIR HOGE.

Affidavit to the foregoing answer is hereby waived.

JOHN HOWARD, p. q.

July 5th, 1880.

The amended and supplemental answer of John J. Kelley referred to in foregoing decree is in the words and figures following, to-wit:

A. & Sup'l Answer of John J. Kelly.

The amended and supplemental answer of John J. Kelly to an original and amended and supplemental bill filed against him and others in the chancery court of the city of Richmond by W. W. Glenn and his administrator, suing for the creditors of the National Express and Transportation Company.

This respondent for further answer to the said bill, says that he is willing to resign and renounce, and does hereby resign and renounce, his office as one of the trustees in the deed in the proceedings mentioned, bearing date the 20th day of September, 1866, made by the said National Express and Transportation Company to John Blair Hoge, C. Oliver O'Donnell, and himself, in trust for the benefit of his creditors. But respondent prays that when funds shall come under the control of the court in this cause he may be reimbursed for the sums expended by him and for his services in the performance of his duty as trustee.

And now having fully answered the said bills he prays hence to be dismissed.

JOHN J. KELLY.

The within answer may be received without affidavit.

JOHN HOWARD, p. q.

Nov. 30th, 1880.

The amended and supplemental report of Com'r Otho G. Kean, referred to in foregoing decree, and dated December 8th, 1880, and the exhibits therewith, are in the words and figures following, to-wit:

Amend'd & Supple. Report.

Commr's Office, No. 1113 Main street,
Richmond Dec'r 8th, 1880.

Glenn's adm'r
v.
National Express & Transportation Co.

To the Hon. Ed. H. Fitzhugh, judge of the chancery court for the city of Richmond:

By request of John Howard, Esq., of counsel for W. W. Glenn's

adm'r, and, as I am informed, with the approval of the court, I now submit the following as a supplement to my report filed in this cause June 19th, 1880:

I. Herewith returned are four papers, marked respectively "A," "B," "C," and "D." They are extracts, taken from the record book of the board of directors of the defendant company. I have carefully compared them with the originals in said book, and find and hereby certify them to be true copies.

II. In my former report, filed June 19th, 1880, a statement was rendered, showing an assignment of 20 per cent. on the par value of *unpaid* stock—being 80 per cent. of the par value of the orignal stock—was considered enough to satisfy the debts due by the defendant company. This statement should be changed, I think, in two particlars. *First*, The assessment whatever it be, should be laid on the par of the stock, and not on that amount, less assessments heretofore made. In other words, the par or face value of the company's stock should furnish the basis of the assessment. *Secondly*, On reflection I am satisfied that the 20 per cent. assessment suggested, if not recommended, in my former report, is too small, and that the same should be increased to 30 per cent., if such increase is within the discretionary power of the court. The reasons seem sufficiently obvious. The stockholders, by whom the enormous debt of the defendant company is due, are very numerous; as shown by evidence in the cause, they are widely dispersed; many are, doubtless, insolvent, many dead, and, consequently, the proceedings necessary to enforce any assessment laid by the court must be exceptionally expensive. The assessments should provide for these costs, &c. Moreover, as many of the debtors are insolvent, any assessment aggregating the exact amount of the defendant's liabilities would manifestly fail to satisfy them; and thus a second, and perhaps a third, might become necessary, each attended with its heavy costs and expenses. It would seem better, therefore, in the interests of debtor as well as creditor, that an assessment should be laid at the start on which enough may realized to satisfy the debts of the company. And this is accordingly recommended. Should more than enough be collected on a 30 per cent. assessment, it will be more easy, as well as less expensive, to *return* the overplus to the stockholders, than it would be (in the event of deciency) to *collect* a second one.

The following statement is based on the forgegoing views:

Par value of 40,044 shares at one hundred dolls. per share,	$4,004,400 00
On which an assessment of 30 per cent. would give, (for payment of the company's debts and the costs and expenses of collection,)	1,201,320 00

This sum greatly exceeds, it is true, the amount of debt which, with probable costs, is about $650.000.00, but I fix the assessment at 80 per cent., because I think it safe to assume that not more than 50 per cent. of any assessment will be realized.

Respectfully submitted,

OTHO. G. KEAN, Comm'r.

Fee, $10.

EXHIBIT "A,"

With Com'r Kean's Supp'l Report, dated Dec'r 8th, 1880.

Extract from proceedings of the board of directors of The National Express and Transportation Company, at a call meeting held Nov'r 1st, 1866.

[Page 149.]

The resignation of Mr. Echols was offered and accepted.

Mr. Joseph R. Anderson, of Richmond, was unanimously elected a director, vice Echols resigned, and took his seat,

* * * * * * * * * * *

[Page 151.]

Resolution offered.

By Mr. Anderson.

Resolved, That the president, or in his absence, the vice-president be instructed to apply to the General Assembly of Virginia, if practicable, on the first day of the ensuing session, to make such amendments of the charter as were indicated by the stockholders at their recent meeting, and in addition thereto an amendment authorizing the company to buy in the stock of delinquent stockholders if, upon legal advice, there be no objection thereto.

Adopted unanimously.

J. V. H. ALLEN, Secretary. M. G. HARMAN, Vice-President.

STATE OF VIRGINIA—*City of Richmond, to-wit:*

I do hereby certify that the above is an extract from the record

of the board of directors of The National Express and Transportation Company, with which the said extract has been by me carefully compared and found correct.

Given under my hand this 8th day of December, 1880.

OTHO. G. KEAN,
Comm'r chancery court, Richmond.

EXHIBIT "B,"

With Com'r Kean's Supp'l Report, dated Dec'r 8th, 1880.

Extract from by-laws and regulations of The National Express and Transportation Company, adopted by the board of directors Dec. 6th, 1866.

8th by-law—page 47 of record:

"A majority of the directors shall be necessary to form a quorum for the transaction of business, but a less number than five directors may adjourn from time to time until a majority be present.

Vacancies in the board, caused by death, resignation, or disqualification, shall be filled by a majority of the votes of all the remaining directors."

P. T. MOORE,
Secretary.

J. E. JOHNSON,
President.

STATE OF VIRGINIA—*City of Richmond, to-wit*:

I do hereby certify that the above is an extract from the record of the board of directors of The National Express and Transportation Company, with which the said extract has been by me carefully compared and found correct.

Given under my hand this 8th day of December, 1880.

OTHO. G. KEAN,
Comm'r chancery court, Richmond.

EXHIBIT "C,"

With Com'r Kean's Supp'l Report, dated Dec'r 8th, 1880.

Adjourned meeting.

Baltimore, Sept. 18th, 1866.

Present:
J. E. Johnston, President.

Austin Dall,
H. G. Fant,
D. J. Foley,
Wm. Devries.

By Mr. ——.

Resolved, That the president of this company be and is hereby directed to execute and acknowledge for record a deed conveying all the property of this company, of every species whatsoever, to John Blair Hoge and John J. Kelly in trust, to secure its creditors upon such terms as he may deem equitable, substantially in accordance with the draft of the deed submitted to this meeting of the board, and with special regard to the pledges of the company already made to the Bank of Commerce of Baltimore, and to the Baltimore and Ohio Railroad Company.

The said deed will be delivered to the trustees named therein, and recorded as soon as practicable.

Adopted unanimously.

On motion, meeting adjourned.

J. V. H. ALLEN, Secretary.

STATE OF VIRGINIA—*City of Richmond, to-wit:*

I do hereby certify that the above is an extract from the record of the board of directors of the National Express and Transportation Company, with which the said abstract has been by me carefully compared and found correct.
Given under my hand this 8th day of December, 1880.

OTHO G. KEAN, Comm'r,
Chancery Court, Richmond.

EXHIBIT "D,"

With Comm'r Kean's Supp'l Report, dated Dec'r 8, 1880.

Copy of resolutions of board of directors of The National Express and Transportation Company, passed at an adjourned meeting held Aug. 9th, 1866:

Ordered, That there be appropriated and set apart one-half of the first receipts from assessments on stock, old and new, to be paid

over ratably to the Baltimore and Ohio Railroad Company and to the Bank of Commerce, in proportion to their respective claims against the company. And if in this way said debts be not paid within fifty (50) days, or at any time sooner if required by said railroad company or bank, the president of this company is directed to execute and deliver any assurance, mortgage, assignment or conveyance which the counsel of said bank and railroad company, or the counsel of either of them may advise for the more perfect security of said railroad company and bank, and to save them harmless in any contingency. And the treasurer of this company is hereby directed to regard such receipts as specifically appropriated to these purposes, and to pay over the same as stated without further order, said assurance, mortgage, assignment or conveyance, to cover any property, effects or claims of this company that may be designated by said R. R. Co. and bank, or either of them. No other lien on the property, effects or claims of this company, shall be given or allowed so as to interfere with the honorable obligations involved in this proposition.

That the president of this board cause to be delivered to said R. R. Co. and bank, each, a duly stamped copy of the foregoing order, as an engagement and agreement of this company, in consideration of forbearance to fulfil the above stipulations in regard to the security of their debts.

Adopted unanimously.

STATE OF VIRGINIA—*City of Richmond, to-wit:*

I do hereby certify that the above is an extract from the record of the board of directors of the National Express and Transportation Company, with which the said extract has been by me carefully compared and found correct.

Given under my hand this 8th day of December, 1880.

OTHO G. KEAN, Comm'r,
Chancery Court, Richmond.

The following paper was filed in this cause on the 14th day of December, 1880; and the same is as follows:

ACT OF INCORPORATION AND AMENDMENT.

An Act

To amend and re-enact an act to incorporate the Southern Express

Company, passed March 22d, 1861, and to incorporate the National Express and Transportation Company.

Passed December 12, 1865.

Be it enacted by the general assembly of the State of Virginia, that the act passed March twenty-second, eighteen hundred and sixty-one, entitled an act to incorporate the Southern Express Company, be amended and re-enacted, so as to read as follows:

"1. Be it enacted by the General Assembly of Virginia that Joseph E. Johnston, William L. Montague, William J. Hawkins, M. G. Harman, Francis Skiddy, Charles W. Purcell, L. W. Glazebrook, John Echols, and Benjamin Hart and their associates, successors and assigns, be and they are hereby declared to be a body corporate and politic by the name of The National Express and Transportation Company, for the purpose of an express and transportation business, and as such shall have perpetual succession, and a common seal, which it may alter or renew at pleasure; and may sue and be sued, implead and be impleaded; contract and be contracted with; purchase, hold and grant such estates, real and personal, as may be necessary for the carrying on of the legitimate business of said company; and make ordinances, by-laws and regulations for the government of all under its authority, and the proper conduct of its affairs.

"2. The capital stock of said company shall be five millions of dollars, and shall be divided into shares of one hundred dollars each; but the said capital stock may from time to time, by order of the board of directors, be increased to a sum not exceeding ten millions of dollars.

"3. The said company may commence business as soon as one-third of its capital stock is subscribed, and one hundred thousand dollars of same is paid up; and on such subscriptions being made, any five of the stockholders may call a general meeting of the stockholders of the said company by advertising the time and place of such meeting, at least twenty days before the time of holding the same, in three of the daily newspapers of Richmond; Provided, however, that any other mode or time of calling such meeting shall be lawful if two thirds of the stockholders are represented thereat. At the meeting convened as aforesaid the said company shall elect, by a majority of the votes then present, or represented, not less than five nor more than nine persons, being stockholders of the said company, to act as directors, who shall represent the said company and manage the business thereof.

"4. The board of directors shall, at their first meeting after their election, elect one of their number as president of the said corporation; and may elect such other officers as they may deem

advisable. The president and directors of this corporation shall hold their offices for one year, and until their successors are chosen. Vacancies in the board of directors shall be filled in such manner as the by-laws of the corporation may prescribe.

"5. The annual election of directors and other officers of this corporation shall be held at such place and in such manner as its by-laws may prescribe.

"6. The said company shall have power to do an express and general transportation business, by land or by water, for the conveyance of persons and property of every kind throughout or beyond the limits of Virginia, in their own conveyances, or in those of such other persons or corporations as they may contract with; and to create and organize branch agencies for the same purpose; and to form any such arrangement, purchase or union with any other express or transportation company as may, in their opinion, be advantageous; and to build, hire, establish and maintain storehouses and other buildings for the safe-keeping of the property entrusted to their care for transportation; and shall have power to indemnify themselves by insurance against any loss or damage by fire, or the risks of navigation or transportation, on any property, held either in their own right or as bailees.

"7. The said company shall have power to sell all freights or baggage, if the same remain unclaimed more than one year, in its possession; but such sale shall be at public auction, and after notice for not less than four weeks in one or more newspapers published at or nearest the place of sale; and if such freights or baggage are of a perishable nature, it may be sold as soon as necessary. Said notice shall contain, as near as practicable, a description of such freight or baggage, the place and time of its deposit with the company, together with the name and residence of the owner or consignee of the same, if known. The proceeds of such sale shall be applied to the satisfaction of all charges upon the said unclaimed freight or baggage arising from its storage, transportation and sale. The residue, if any there be, shall be held in trust for the owner; and it shall be the duty of the said company to keep, at its principal office, a faithful record of all proceedings had under this power of sale; which record shall be open to the inspection of all claimants.

"8. The principal office shall be kept at Richmond, Virginia, unless the same be changed to some other place by a vote of two-thirds of the directors; and the said company may establish as many local offices as the president or board of directors may deem necessary.

"9. The right to the franchise granted by this act shall rest as soon as one-third of the capital stock is subscribed, and one hundred thousand dollars of the same shall be paid up. Of these facts it shall be the duty of the company to inform the governor, as the

officers of banks about to be put into operation are required to do.

"10. This act shall be in force from its passage, and shall be subject to modification or repeal, at the pleasure of the General Assembly."

Office of Keeper of Rolls of Va.

I hereby certify that the foregoing Act of Assembly is a true copy from the roll in my office, this 30th day of November, 1880.

P. H. McCAULL,

Clerk House of Delegates and Keeper of the Rolls of Virginia.

An Act

To amend the 8th section of an act entitled an act to amend and re-enact an act to incorporate the Southern Express Company, passed March 22, 1861, and to incorporate The National Express and Transportation Company, passed December 12, 1865.

Passed December 18, 1865.

1. Be it enacted by the General Assembly of Virginia, That the eighth section of the act passed December twelfth, eighteen hundred and sixty-five, entitled an act to amend and re-enact an act to incorporate the Southern Express Company, passed March twenty-second, eighteen hundred and sixty-one, and to incorporate The National Express and Transportation Company, be amended and re-enacted so as to read as follows:

§ 8. The principal office shall be kept at Richmond, in Virginia, unless the same be removed to some other place within this Commonwealth, by order of the stockholders in general meeting, and the said company may establish as many local offices as the President or Board of Directors may deem necessary.

2. This act shall be in force from its passage.

Office of Keeper of Rolls of Va.

I hereby certify that the foregoing Act of Assembly is a true copy from the rolls in my office, this 30th day of November, 1880.

P. H. McCAULL,
Clerk House of Delegates and Keeper of the Rolls of Virginia.

The following is the opinion of court referred to in the foregoing decree of December 14th, 1880:

OPINION OF COURT.

Glenn's Adm'r v. *The National Express and Trans. Co., &c.*

This suit was instituted in 1871, but nothing seems to have been done in it until the Spring term of this court of 1879, when leave was asked and obtained to file an amended and supplemental bill.

This inaction was caused, it is alleged, by reason of litigation pending in other States. But after the filing of the amended and supplemental bill in August, 1879, the cause has been actively prosecuted by the plaintiff. As soon as it matured for hearing it was referred to one of the master commissioners of the court to ascertain and report to the court an account of the debts and liabilities of the company, and also a statement of its assets.

Due notice of the enquiries ordered to be made by the master commissioner was given by publication in a newspaper then published in the city of Richmond.

The master commissioner, after examining the books of the company and other documentary evidence, and taking the depositions of numerous witnesses, has made his report, showing an aggregate indebtedness of the company on the 1st day of June, 1880, of $509,392.41.

There is no exception to this report. It appears to be correct in all respects in regard to the indebtedness of the company, and must therefore be approved and confirmed as to said indebtedness.

Regarding the indebtedness of the company as above indicated to be established, the question arises, how is it to be paid?

By a deed dated on the 20th day of September, 1866, the company conveyed all of its estate and property of every description to trustees to secure the payment of its debts. And the answer to the question just mentioned depends largely upon the validity, construction and enforcement of that deed.

I. The court is clearly of opinion that the said deed is valid.

This corporation was chartered by the Legislature of Virginia, and had its principal office in the city of Richmond, the capital of the State; and though by the 8th section of act of incoporation, power was given to two-thirds of the directors to change the locality of the principal office without restriction as to State boundaries, yet by an amendment to the charter, passed December 18th, 1865, this was limited to removal to "some other place within this Commonwealth." And power was given to establish local offices anywhere.

This company, therefore, is a Virginia corporation, and as well by positive statute as by an inherent legal incident of its existence, it is domiciled in Virginia, though it may, and was, designed to

do business elsewhere as well. *Bank of Augusta* v. *Earle*, 13 Peters, 519; *Paul* v. *Virginia*, 8 Wall., 186.

The deed in question was executed, acknowledged, delivered and recorded in the city of Richmond, Virginia, as is shown by the certificate, in Richmond, of the notary public, Roger J. Page, bearing even date with the deed, and by the certificate of Robert Howard, clerk of the hustings court of Richmond, of the recordation of the deed on the day following. And as will be seen, it was executed by the president of the company by virtue and in pursuance of a resolution of the board of directors, in whom the whole management of the affairs of the company was vested, conferring upon him full authority and power for that purpose. It is therefore the deed of a Virginia corporation, under its corporate seal, and by proper authority duly made and delivered in Virginia, and its validity and effect should be determined by the laws of this state.

It purports to convey all of the property of the company in trust for the benefit of all its creditors, and this it was perfectly lawful and proper to do. It gives preferences to some creditors over others. But no law is better established in Virginia than that such preferences are legal. And this will be of no practical importance if the assets of the company be sufficient to pay its debts.

It retains for a limited time possession in the company of the property conveyed. But that this may be done is equally well established law in Virginia.

After repeated decisions of the supreme court of appeals of this state, establishing the validity of such deeds, the court entertains no doubt as to the legality and binding effect of this deed in all respects. The decision of the supreme court of Maryland, based upon some of these Virginia decisions, and the testimony of many of the prominent counsel of the bar of this court given as experts as to the law of Virginia in respect to this deed, and establishing the validity of the deed was, in the judgment of this court, plainly and clearly correct. See *Balto. & Ohio R. R. Co.* v. *Glenn*, 28 Maryland R., 287.

II. The validity of the deed being established, the next question is, what was its legal effect? What were the terms of the conveyance and what did it convey?

It is evident from the report of the commissioner and from the face of the deed that the company was greatly embarrassed financially, and that its general and leading object in executing the deed was to dedicate all of its assets and effects of every kind to the payment of its debts. Accordingly, to accomplish this purpose, it says, "the party of the first part doth hereby grant, bargain, sell, convey, assign and set over unto the said parties of the second part (the trustees) all the estate, property, rights and credits of the

said party of the first part of every kind, wheresoever situated, in or out of the state of Virginia."

It is difficult to conceive of larger and more comprehensive words of description of the property and rights and credits thus conveyed and assigned. But the deed does not stop there, it proceeds to make a general enumeration of the thing and rights conveyed and assigned, thus, "including leases, horses, wagons, carts, harness, office furniture, safe, chests, fixtures and other effects, and moneys payable to the company, whether on calls or assessments on the stock of the company, or on notes, bills, accounts or otherwise, which property and moneys are enumerated and set forth in a schedule to be marked A, and annexed hereto as soon as can be conveniently done, but the omission of any property from such schedule is not to prevent the same from being hereby granted or assigned."

Here is an express enumeration of "moneys payable to the company, whether on calls or assessments of stock of the company, or on notes, bills, accounts or otherwise," and though no schedule was ever made or annexed to the deed, yet the distinct reference to such a schedule as is described, with the statement that the "omission of any property, money or other thing from such schedule is not to prevent the same from being hereby granted or assigned, is ample proof that it was the object, intent and meaning of the company to convey all of its estate, rights and credits of every kind in trust for the payment of its debts. And in the deed it made and executed, it used language which has been held by the courts to be apt and sufficient to pass everything the company owned, or to which it was entitled, inclusive of the estate, property, rights and credits of the company of every kind, and wherever situated. See *Maitland* v. *Newton*, 3 Leigh, 714; citing *Comegy's* v. *Vasse*, 1 Peters, 193; *Mundy* v. *Vawter*, 3 Grat., 518; *Griffin* v. *Macauley*, 7 Grat., 477; *Wickham* v *Lewis, Martin & Co.*, 13 Grat., 427, 437, 438; *Milner* v. *Metz*, 16 Peters, 221.

And the same principle seems to have prevailed in the bankrupt court, where the regtster assigns and conveys all the estate, real and personal, of the bankrupt. The decisions in such cases appear to be uniform that the right to receive unpaid subscriptions to the capital stock of a bankrupt corporation passes, by the act of Congress and the register's deed, to the assignee in bankruptcy. Indeed no question seems to have been made upon the subject, and the cases seem to have proceeded upon the assumption that such right was vested in the assignee. See *Sanger* v. *Upton*, assignee, 91 U. S. R., 56 *Upton, assignee*, v. *Tribilcock*, idem, p. 45; *Turnbull* v. *Payson*, 95 U. S. R. 418; *Pullman* v. *Upton*, 96 U. S. R., 328.

By chapter 57, section 3, p. 546 of the Code of Virginia of 1873 (which is a reprint, in this respect, of the like chapter in the Code of 1860) it is provided that "upon every subscription for

shares in any joint stock company (other than a bank of circulation) there shall be paid upon each share two dollars at the time of subscribing and the residue thereof as required by the president and directors. A subscription to such stock obviously creates a debt or obligation, of which two dollars a share are payable *in presenti* and the residue *in futuro*. This residue is an express credit extended by the company to the stockholders, and the company has a plain legal statutory right to demand payment whenever it may be needed, or, as the statute declares, "as (when) required by the president and directors." And it is further provided by the statute —see chapter 57, section 23, p. 550, Code of 1873—(same chapter, section 21, p. 334, Code of 1860) that if any money which any stockholder has to pay upon his shares be not paid as required by the president and directors, the same, with interest thereon, may be recovered by warrant or action, according to the amount, or by motion in lieu of an action. So that the statute not only recognizes such a subscription as a debt to the company—an express credit intended by the company to the stockholders—but it provides the remedy for its recovery by legal proceedings. And, independently of the statute, it seems that on general principles such subscriptions are recognized by the courts as debts due to the company, which the company has the right to recover of the stockholders, and which are to be regarded as a fund which the corporation holds for the payment of its debts. See *Marsh, &c.* v. *Burroughs*, Wood's Cir. Ct. R., pp. 468, 479; *Hatch* v. *Dana*, 101 U. S. R., pp. 210, 211.

The court is clearly of the opinion that the broad and comprehensive terms of the deed embraced the unpaid subscriptions of stock, and that it conveyed and transferred to the trustees for the purposes of the trust the right to receive, when called for, all such unpaid subscriptions, and that the deed carried all the credits belonging to the company in that respect. And the court is further of opinion that, inasmuch as the president and directors have failed and omitted to make those rights and credits of the company available to its creditors by making a call and assessment upon the stockholders, it is the duty of the court, under the law, to effectuate those rights and collect and appropriate those credits in such manner and by such means as may be necessary and proper for the execution of the trusts of the said deed.

III. Having decided that the deed is valid, and that it embraced all the property, rights and credits of the company, it remains to be considered how the rights of the creditors are to be enforced.

It seems, from the proceedings in this case, that the great bulk of the property, effects and claims of the company consists of unpaid subscriptions to its capital stock; and the creditors must look entirely to this fund for the payment of their debts.

As to 80 per cent. of the stock, the subscription is wholly un-

paid. And the president and board of directors have made no call or assessment on the stockholders, and no order whatever in regard to the collection of any part of this unpaid subscription. And for many years they seem to have entirely abandoned the business of the company. It is charged that neither the directors nor the stockholders of the company have had a meeting for nearly fourteen years. But, although the company has ceased to do business, and the president and directors no longer give attention to its affairs, the corporation has not become extinct. Under the statue of Virginia, chapter 56, section 31, p. 543, of the Code of 1873, "such corporations may sue and be sued, as before, for the purpose of collecting debts due to it, prosecuting rights under previous contracts with it, and enforcing its liabilities, and distributing the proceeds of its works, property and debts among those entitled thereto." And by sect. 4 of the charter of this company (Acts 1865–'6, p. 380), it is expressly provided that the president and directors of this corporation shall hold their offices for one year, and until their successors are chosen. And see, also, to same effect, chapter 57, section 14, Code of 1873, p. 549, where the president and directors of the company and the stockholders of the company are in default in making provision for the payment of its debts, it is made the duty of the court to enforce payment of the stock subscriptions to an extent sufficient, with any other assets that may be in the hands of the trustees, to pay the debts of the company, the costs of suit and the expenses incident to the execution of the trusts. For it seems to be well settled that a court of equity may enforce payment of stock subscriptions, though there may have been no calls for them by the company. *Hatch* v. *Dana*, 101 U. S. R. (11 Otto), 214, 215; *Thompson* v. *Stockholders*, sects. 15 and 345.

It is to be regretted that the parties themselves have not attended to this duty. They could have acted with a knowledge of all the facts, and were in a better position and circumstances to know what was requisite and proper, than a court can be. It is very clear that a call and assessment must be made on the stockholders, but it is difficult to determine what it should be.

With the lights now before the court, it is deemed most advisable under all the circumstances to accept the recommendations of the commissioner in his supplemental report of December 8, 1880, which is as follows: "In my former report, filed June 19th, 1880, a statement was rendered showing that an assessment of 20 per cent. on the par value of unpaid stock, being 80 per cent. of the par value of the original stock, was considered enough to satisfy the debts due by the defendant company. This statement should be changed, I think, in two particulars. First. The assessment, whatever it be, should be laid on the par of the stock, and not on that amount, less assessments heretofore made. In other words, the par or face value of the company's stock should furnish the

basis of the assessment. Secondly. On reflection, I am satisfied that the 20 per cent. assessment suggested, if not recommended, in my former report, is too small; and that the same should be increased to 30 per cent., if such increase is within the discretionary powers of the court.

The reasons seem sufficiently obvious. The stockholders by whom the enormous debt of the defendant company is due are very numerous, as shown by evidence in the cause, they are widely dispersed; many are doubtless insolvent, many dead, and consequently the preceedings necessary to enforce any assessment laid by the court must be exceptionally expensive. The assessment should provide for those costs, &c. Moreover, as many of the debtors are insolvent, any assessment aggregating the exact amount of the defendant's liabilities would manifestly fail to satisfy them, and thus a second and perhaps a third might become necessary, each attended with its heavy costs and expenses. It would seem better, therefore, in the interest of debtor as well as creditor, that an assessment should be laid at the start, on which enough may be realized to satisfy the debts of the company. And this is accordingly recommended. Should more than enough be collected on a 30 per cent. assessment, it will be more easy as well as less expensive to *return* the overplus to the stockholders than it would be (in the event of a deficiency) to collect a second one."

IV. By the answer of John Blair Hoge, and the amended and supplemental answer of John J. Kelley, surviving trustees in the said deed of trust, it appears that they are so situated personally as to be unable to execute the trusts, and they desire to be relieved from the office of trustee. It would be a source of satisfaction to the court if they would continue to act, but inasmuch as they decline to do so, they should by proper order be removed from their said office.

It is represented to the court by the counsel for the creditors whose debts have been established, that John Glenn, Esquire, of Baltimore, Maryland, is a fit and proper person to be substituted and appointed as trustee to execute the trusts of said deed, and a proper order appointing him as substituted trustee will be entered. But before he undertakes to act in the execution of the trust he will be required to give bond with good security before the clerk of this court, in the penalty of $100,000, conditioned for the faithful discharge of his duties as such substituted trustee.

He will be required from time to time to report his proceedings to the court in the execution of the trust, so that the whole trust shall be executed under the supervision of the court. He will deposit his collections, after paying the necessary costs and expenses incident to the administration of the trust, in the Planters National Bank of Richmond, to the credit of the court in this cause, or in

such other bank as may from time to time be designated by the court.

And the said substituted trustee shall from time to time—not omitting any period of six months—render an account of his transactions before one of the master commissioners of this court. And such commissioner will be directed, upon such settlement being made, to report the same to the court. And upon the coming in of such report, as soon as sufficient sums shall be collected, the court will take order as to the proper distribution of the fund among those entitled thereto.

And at another day, to-wit:

At a chancery court of the city of Richmond, continued by adjournment and held for said city on the 3rd day of January, 1881.

John W. Wright, sheriff of the city of Richmond, and as such administrator of W. W. Glenn, deceased, who sues on behalf of himself and other creditors of the National Express and Transportation Company, Pl't'ffs.

against

The National Express and Transportation Company, W. H. Perot, Wm. Devries, D. J. Foley, J. R. Anderson, F. P. Zimmerman, J. Carter Marbury, Wm. H. Webb, Lorenzo Norvell, M. B. Poitiaux, and John Blair Hoge and John J. Kelly, trustees, Def'ts.

This day came John Glenn, by John Howard, his counsel, and represented to the court that he had duly executed the bond before the clerk of this court, required of him as substituted trustee in the deed of trust in the proceedings mentioned by the decree entered herein on the 14th day of December, 1880; and exhibited to the court the said bond, bearing date the 31st day of December, 1880, with John M. Glenn, John C. Backus, Henrietta R. Glenn, Edward G. Kenly as sureties thereon, executing the same by said John Howard, their attorney in fact, and the powers of attorney from the said sureties authorizing the execution of the said bond, in their stead by their said attorney in fact, accompanied with affidavits of the several sureties, of the sufficiency of such security and the recommendation in writing of Charles Marshall and John Howard, attorneys and counsel for the creditors of the defendant company, whose claims were established by the said decree of the 14th December, 1880, that the said sureties be accepted; and the court being satisfied of the due execution of the said bond in all respects, and of the sufficiency of the said sureties, doth hereby approve the said bond and the action of the clerk of this court in taking and accepting the same.

And at another day, to-wit:

At a chancery court for the city of Richmond, continued by adjournment and held for said city, on the 11th day of January, 1881.

John W. Wright, sheriff and adm'r, &c., P't'ff,
against
The National Express and Transportation Co. & als., Def'ts.

On motion of the plaintiff it is ordered that Master Commissioner O. G. Kean do, with all convenient speed, have certified copies made under his inspection of the stock-book and ledger stock-book of the said National Express and Transportation Company, referred to in the report of the said commissioner of the 19th day of June, 1880, and deliver the same, together with the said books and all other books of the said company that may be in the office of the said commissioner, to John Glenn, substituted trustee in the deed of trust in the proceedings mentioned, or to his counsel.

And at another day, to-wit:

At a chancery court for the city of Richmond, continued by adjournment and held for said city on the 30th day of April, 1881.

John W. Wright, sheriff and adm'r, &c., Pl't'ff,
against
The National Express & Transportation Co. & als., Def'ts.

Upon consideration of the report of Commissioner O. G. Kean, filed on the 5th day of March, 1881, it is ordered that the sum of forty dollars be, and the same is hereby allowed the said commissioner, as his fee for the services rendered by him as indicated in said report, and that the sum of one hundred dollars be, and the same is hereby allowed the said Wm. G. Allen for his services as copiest, rendered by him as indicated in said report; the said several sums to be paid by the plaintiff, John W. Wright, administrator of W. W. Glenn, deceased, out of any funds in his hands to be administered, or by John Glenn, substituted trustee in the deed of trust in the proceedings mentioned, out of any trust funds in his hands to be administered. Said several sums to be in full satisfaction for the said services respectively rendered as aforesaid, and to be subject to proper credits for any part thereof, if any, heretofore received by either the said commissioner or the said Allen.

And at another day, to-wit:

At a chancery court for the city of Richmond, continued by adjournment and held for the said city, the 13th day of October, 1881.

John W. Wright, sheriff and adm'r, &c., Pl't'ff,
against
The National Express & Transportation Co. & als., Def'ts.

This day came James J. Trotter, by counsel, and tendered his petition in this cause, and asks leave to file the same, and court, without refusing or granting leave to file said petition, takes time to consider said request.

And at another day, to-wit:

At a Chancery court for the city of Richmond, continued by adjournment and held for the said city, the 2d day January, 1882:

John W. Wright, sh'ff and adm'r, &c., Pl't'ff.
against
The National Express and Transportation Co. and als., Def'ts.

In the matter of the petition of J. J. A. Trotter.

It appearing to the court that notice of the motion made in this matter on the 15th December, 1881, has been duly served on Wise & Hobson and W. W. Gordon, the attornies for said Trotter, it is ordered that said motion be docketed and continued until to-morrow morning at ten o'clock.

And at another day, to-wit:

At a Chancery court for the city of Richmond, continued by adjournment and held for the said city, the 14th day of May, 1883:

John W. Wright, sh'ff and adm'r, &c., Pl't'ff.
against
The National Express & Transportation Co., and als., Def'ts.

This cause came on this day to be heard on the papers formerly read, and the petition of J. J. A. Trotter, and the petition of John E. Hurst and others, which said petitions are hereby ordered to be filed in this cause. And the court doth adjudge, order, and decree that John Glenn, who was appointed substituted trustee in the place of Kelly and Hoge, is hereby directed to take no further steps towards the collection of the thirty per cent. assessment against the stockholders of the defendant company until the 9th day of June, 1883, and that he shall suspend the prosecution of

any suits which he may have heretofore instituted under and by virtue of the decree of December 14th, 1880, in this cause, until the said 9th day of June, 1883. And leave is given the complainant, or any other party interested, to answer the said petitions or either of them.

And at another day, to-wit:

At a Chancery court for the city of Richmond, continued by adjournment and held for the said city, the 9th of June, 1883:

John W. Wright, sh'ff and adm'r, &c., Pl't'ff.
against
The National Express & Transportion Co., and als., Def'ts.

This cause came on again to be heard, formerly read, and was argued by counsel. On consideration whereof the court doth adjudge, order, and decree that the restraining order of May 14th, 1883, be continued until the 21st day of June, 1883.

And at another day, to-wit:

At a Chancery Court for the city of Richmond, continued by adjournment and held for the said city, the 19th of June, 1883.

John W. Wright, sh'ff and adm'r, &c., Pl't'ff.
against
The National Express & Transportation Co. & als, Deft's.

This day the Baltmore and Ohio Railroad Company, the Bank of Commerce, (of Baltimore), John W. Wright, sheriff of the city of Richmond, and as such administrator of W. W. Glenn, deceased, Francis Murray, for the use of John R. Terry, Henry M. Bash, trustee for John O. Reid, Henry R. Robins and Nicholas E. Watkins, Luke H. Miller, the Philadelphia, Wilmington and Baltimore Railroad Company, the Seaboard and Roanoke Railroad Company, the Richmond and Danville Railroad Company, the Orange and Alexandria Railroad Company, the Wilmington and Weldon Railroad Company, J. T. M. Barnes, and Richard J. Allison, by leave of the court, filed their joint and several answer to the petition of John E. Hurst and others filed herein on the 14th day of May, 1883. And the said respondents, by like leave of the court also filed their joint and several answer to the petition of J. J. A. Trotter, also filed herein on the said 14th day of May, 1884.

And at another day, to-wit:

At a Chancery Court for the city of Richmond, continued by adjournment and held for the said city, the 30th of June, 1884.

John W. Wright, sh'ff & adm'r &c., Pl't'ff.
against
The National Express & Transportation Co. & als., Def'ts.

This day by leave of the court the Baltimore and Ohio Railroad Company, the Bank of Commerce of Baltimore, John W. Wright, sheriff, and ss such administrator of W. W. Glenn, deceased, in behalf of themselves and all other creditors of the said company, whose claims are established by the said decree of December 14th, 1880, filed their joint and several answer to the petition of Thomas L. Farish and others filed in this cause, to which answer, said petitioners replied generally.

And at another day, to-wit:

At a Court of Chancery for the city of Richmond, continued by adjournment and held for the said city, the 21st July, 1883.

John W. Wright, sh'ff & adm'r &c., Pl't'ff.
against
The National Express & Transportation Co., & als., Def'ts.

This cause came on this day to be heard again on the papers formerly read, the petition filed, the answers thereto, the replications to said answers, the exhibits filed, the depositions of witnesses, and was argued by counsel, on consideration whereof the court, without at present suspending the operation of the decree of December 14th, 1880, but expressly reserving for future consideration the question whether the stockholders are liable to any extent on their unpaid subscriptions for stock taken by them, and the question whether the decree of December 14th, 1880, should be set aside and the bill dismissed, and without at this time deciding or considering any question in the cause raised by the petitions or answers thereto, but reserving all such questions for future consideration and determination by the court, doth by consent of parties to this cause, as expressed by the endorsement of their counsel hereon, adjudge, order and decree that John Glenn, trustee, on the payment to him, within six months from the date of this decree, by any of the subscribers to the stock of the defendrnt company, or by any other person claimed to be liable on account of said stock, of twenty-five per centum of the original amount of said subscription, with interest thereon at the rate of six per centum per annum, from thirty days from the date of this decree, with any costs incurred heretofore or by said trustee in any suit brought by

him heretofore, or which may hereafter be brought before tender of said twenty-five per cent. under this decree to recover of such stockholder or other party, the amount for which he may be responsible on said stock under the decree in this cause, shall execute a receipt therefor to operate as a full acquittance and discharge of all persons on account of such subscription, both of the original subscribers thereto, and of any assignee thereof.

And at another day to-wit:

At a Court of Chancery for the city of Richmond, continued by adjournment and held for the said city, the 13th day of December, 1883.

John W. Wright, sh'ff & adm'r, &c. Pl't'ff.
against
The National Express & Transportation Co. & als., Def't's.

In order that all persons interested may have the opportunity to avail themselves of the compromise provided by the decree herein of July 21, 1883, if they elect so to do, it is ordered that John Glenn, trustee, do forthwith mail a copy of the said decree to every person against whom any liability is asserted in this suit; and the court further orders the said John Glenn, trustee, in every case where suit may hereafter be instituted before January 21, 1884, against any person, to serve a copy of said decree of July 21, 1883 upon such person before the institution of such suit, except in cases of attachment; and in cases of attachment the said copy shall be served as soon thereafter as practicable. And said trustee is directed to report to this court how he has executed this order.

And at another day, to-wit:

At a Court of Chancery for the city of Richmond, continued by adjournment and held for the said city, the 18th of December, 1883.

John W. Wright, sh'ff & adm'r &c., Pl't'ff.
against
The National Express & Transportation Co. & als., Def'ts.

This cause came on this day to be heard again, on the papers formerly read, the report of John Glenn, trustee, this day filed in respect to claim against the estate of Michael C. Garber, the affidavit mentioned in said petition, and was argued by counsel. On consideration whereof, the court being satisfied from said petition and exhibits that the compromise suggested by the said trustee is

judicious, and is consented to by the creditors of said company, as evidenced by the endorsement of their counsel on this decree, doth adjudge, order and decree that said trustee, John Glenn, be and he is hereby authorized to accept the sum of twelve hundred and fifty dollars in full of the liability of the estate of Michael C. Garber, on account of the one hundred shares of stock in said petition mentioned, and to grant an acquittance and discharge of such liability, but such discharge is not to operate as an acquittance of Henry J. Rodgers, transferree of said stock, from liability in respect thereto.

And at another day, to-wit:

At a Chancery Court for the City of Richmond, continued by adjournment and held for the said city, of the 24th day of January, 1884.

John W. Wright, sh'ff and adm'r, &c., Plt'ff.
against
The National Express and Transportation Co. and als., Def'ts.

This day came George A. Smith and, by leave of court, filed his petition is this cause; whereupon, this cause coming on to be heard on the papers formerly read, and on the said petition of George A. Smith, and being argued by counsel, the court doth adjudge, order and decree, that this cause be referred to W. J. Leake, one of the commissioners of this court, to take proof of said George A. Smith, and said commissioner shall report the amount thereof, principal and interest, and whether the same is a preferred claim under the deed of trust referred to—these proceedings bearing date on the 20th day of September, 1866, together with any matter, specially stated, deemed pertinent by himself, or required by any party interested, to be so stated.

And at another day, to-wit:

At a Chancery Court for the City of Richmond, continued by adjournment and held for the said city, the 9th of February, 1884.

John W. Wright, sh'ff and adm'r, &c., Plt'ff.
against
The National Express and Transportation Co. and als., Def'ts.

This day came Junius L. Brodie, and by leave of court, filed his petition in this cause; whereupon, this cause came on to be further heard, upon the papers formerly read, and, on the said petition of Junius L. Brodie, with the exhibit filed therewith, and was

argued by counsel. On consideration whereof, the court doth adjudge, order and decree that the decree entered in this cause on the 24th day of January, 1884, be amended and enlarged so as to require commissioner W. J. Leake, to enquire into the claim of the said petitioner, J. L. Brodie, and to report the character and amount of same, principal and interest, if found by him to be due and unsatisfied, and for them to enquire whether the same is a preferred claim under the deed of trust referred to in the proceedings in this cause, bearing date on the 20th day of September, 1866, and make report thereof to the court, with any matter specially stated, deemed pertinent by himself, or required by any party interested, to be so stated.

And at another day, to wit:

At a chancery court for the city of Richmond, continued by adjournment and held for the said city, March 8th, 1884.

John W. Wright, sh'ff and adm'r, &c., Plt'ff.
against
The National Express and Transportation Co. and als., Def'ts.

The death of John W. Wright, late sheriff of the city of Richmond, and as such, administrator in Virginia, of the estate of W. W. Glenn, deceased, is suggested, and, on motion of John Glenn, administrator of the said estate in Maryland, the same is committed to John Howard, Esq'r, who gave bond and qualified according to law as administrator de bonis non of said W. W. Glenn, dec'd. And thereupon, on motion of said Howard, this suit is revived as to the said estate in the name of said John Howard, as administrator de bonis non of said estate of W. W. Glenn. And thereupon this cause came on again to be heard, on the papers formerly read, the report of the trustee, John Gleen, dated the 18th January, 1884, in reference to the liability of Thomas Opie, as a stockholder of the defendant company, the exhibits filed therewith, from an offer of compromise made by said Opie; the report of said trustee dated January 17th, 1884, in reference to the liability of Hugh W. Sheffey as a stockholder of the defendant company, the exhibit filed therewith being and offer of compromise made by said Sheffey, to which reports there are no exceptions, and was argued by counsel. On consideration whereof, and it appearing that by reason of the inability of the said two stockholders, collections of amounts greater than they offer to pay could not be enforced. And it further appearing from said reports of the trustee that it will be to the advantage of the fund, and of the other stockholders, to accept said offer on the grounds and for the reasons set forth in said reports, it is adjudged, ordered, and decreed that John Gleen,

trustee, is hereby authorized on prompt payment by the said Thomas Opie, of the sum of five hundred dollars to grant to said Thomas Opie, an acquittance and discharge of his liability as a subscriber to sixty shares of the stock of the defendant company. And the court doth for like reasons further adjudge, order and decree that the said trustee, on prompt payment of the sum of one thousand dollars by Hugh W. Sheffey, is authorized to grant unto the said Hugh W. Sheffey and acquittance and discharge of his liability as a subscriber to one hundred and fifty shares of the stock of the defendant company. And the court doth further adjudge, order and decree that William J. Leake, Esq., one of the commissioners of this court, do proceed with all convenient speed to ascertain and report to the court, the order of priority in which the debts due by said National Express and Transportatiou Company shall be paid out of any property and assetts conveyed by the said deed of trust of the 20th day of September, 1866. And the said commissioner is directed to report specially any matter deemed pertinent by himself, or which any party in interest may require to be specially stated by him.

And at another day, to-wit:

At a Chancery court for the city of Richmond, continued by adjournment and held for the said city, the 11th April, 1884.

John Howard, adm'r, &c., Pl't'ff.
against
The National Express & Transportation Co. & als., Def'ts.

This day came Thomas J. Jennings, Goode Bryan, and Charles B. Purcell, by counsel, and moved the court for leave to file their petition herein, to the granting of such leave the complainants, by counsel, objected. On consideration whereof, the court doth allow the said petition to be filed, and remands the same to the rules to be matured.

And at another day, to-wit:

At rules held in the clerk's office of the said court on the 1st Monday in May, 1884.

This day came John Howard, counsel for the defendants in the last above-named petition and in his own proper person as plaintiff in this suit, and waived process, and service thereof, on said petition, and failing to answer said petition, it is ordered that unless the said defendants should appear at the next rules and plead an-

swer or demur to said petition, the same would be taken for confessed as to them and the matters thereof, decreed accordingly.

At a chancery court for the city of Richmond, continued by adjournment and held for the said city, on the same day, to-wit: on the 27th of June, 1884.

On the said last named 27th day of June, 1884:

John Howard, adm'r, &c., Pl't'ff.
against
The National Express & Transportation Co. and als., Def'ts.

On motion of the plaintiff it is ordered that this cause be removed to the Circuit Court of Henrico county to be proceeded in, heard, and determined by that court according to law.

The foregoing is a true copy of all the rules and proceedings in the foregoing cause.

Teste:

BENJ. H. BERRY, Clerk.

Clerk's fees, $108.06.

Teste:

BENJ. H. BERRY, Clerk.

In the Circuit Court of the county of Henrico, continued by adjournment and held for said county, the 1st day of July, 1884:

W. W. Glenn's adm'r
vs.
The National Express and Transportation Company and others.

It appearing from an order of the Chancery Court of the city of Richmond of the 27th day of June, 1884, that this cause has been removed from the said Chancery Court to this court, the same is hereby ordered to be placed upon the docket of this court, to be hereafter proceeded in, heard and determined in this court according to law.

In the Circuit Court of the county of Henrico, continued by adjournment and held for the said county, the 10th day of July, 1884:

Glenn's adm'r
vs.
Nat'l Ex. and Trans. Co. &c.

On motion of the plaintiff, the death of the petitioner, J. J. A Trotter, is suggested.

And at another day, to-wit:

At a Circuit Court of the county of Henrico, continued by adjournment and held for the said county, Dec. 4, 1884.

Glenn's adm'or and others
vs.
National Express and Transportation Company and others.

In accordance with directions to the clerk of this court, by Green Peyton, this day filed, bearing date the 2d day of December, 1884, the petition heretofore filed by him in this cause, for a rehearing of various decrees, and any other proceedings taken in his name in the cause for the same purpose are hereby dismissed.

At a Circuit Court of the county of Henrico, continued by adjournment and held for said county December 9th, 1884.

Glenn's adm'r and others, Pl't's.
against
National Express and Transportation Company and others, Def'ts.

It appearing to the court that this suit has abated as to the estate of the petitioner, J. A. J. Trotter, and it being represented to the court that said estate is insolvent, and that John E. Hurst and others, and Thomas L. Farish and others, stockholders, who filed petitions herein for a rehearing of the decree of December 14th, 1880, and upon which the order of 21st July, 1883, was entered, have accepted the terms thereof, the petition of the said Trotter and the said petitions of the several other stockholders aforesaid are hereby dismissed, and John Glenn, trustee of the defendant company, is directed to proceed to execute the said decree of December 14th, 1880, (entered by the Chancery Court of the city of Richmond, from which court this cause has been removed and transferred to this court according to law), as if the said order of July 21st, 1883, had never been entered.

At a Circuit Court of the county of Henrico continued by adjournment and held for said county February 21st, 1885.

Glenn's adm'r
vs.
National Ex. & Trans. Co. & als. } In chancery.

On the application of the plaintiffs, it is ordered that Wm. J. Leake, who is acting as a special commissioner of this court in this cause, be, and he is hereby directed, to make a complete copy

from the record book of the Board of Directors of the defendant company, heretofore produced and proven by John J. Kelly, of the proceedings of the said board had on November 1st, 1866, and certify the same, and file it with the clerk of this court as speedily as possible.

Report of Commissioner Leake under the foregoing order, filed Feb. 25, 1885.

Called Meeting.

Richmond, Nov. 1st, 1866.

Present: M. G. Harman, vice-president; H. G. Fant, Wm. Devries, C. R. Mason, D. J. Foley.

The resignation of Mr. Echols was offered and accepted.

Mr. Jos. R. Anderson, of Richmond, was unanimously elected a director, vice Echols resigned, and took his seat.

The resignation of Mr. H. G. Fant was offered and accepted.

The resignation of Gen. Jos. E. Johnston, as director and president, was read, and unanimously accepted.

Mr. R. P. Zimmerman, of Atlanta, Ga., was unanimously chosen director, vice Fant resigned, and took his seat.

The resignation of Mr. C. R. Mason was offered and accepted.

Also that of Mr. Austin Dall.

The following named gentlemen were unanimously elected directors, viz.: J. Carter Marbury, vice Mason resigned; Lorenzo Norvelle, vice Johnston resigned; Wm. H. Perot, vice Dall resigned.

The resignation of Wm. J. Hawkins was offered and accepted, and W. H. Webb, elected.*

By Mr. Marbury—Whereas it is the desire of this company to meet all of its obligations at the earliest possible moment by carry-

*Note by Commissioner.—The words "the resignation of Wm. J. Hawkins was offered and accepted, and W. H. Webb, elected," are in pencil in the original, and are copied herein in pencil, in like manner.

W. J. LEAKE, Com'r.

ing out the provisions of the deed of trust made by this company on the 20th day of September, 1866, by forcing by all legal means the delinquent stockholders to pay up their arrearages.

Be it resolved, That the gen'l sup't, Jno. J. Kelly, Esq., be directed to immediately suspend all the business operations of the National Ex. & Trans. Co. at all points, dismissing all the employees of the company, excepting the treasurer, and a sufficient number of teamsters to take care of the horses.

Resolved, That the vice-president be directed to turn over all the property of the company to the trustees appointed under the above recited deed of trust, with the request to them that they will advertize to receive proposals on the tenth (10th) day of December next for the purchase of the same in mass, and failing to get a satisfactory bid for the same, to sell the same on the appointed day to the highest bidder. And that a list of all the property shall be open for the inspection of bidders at all the principal offices of the company.

Provided, that if the said company shall, on or before said day, pay off the obligations in said deed secured and set forth, the said property shall be re-delivered by the said trustees to the said company or its agents.

Resolved, That the president, or, in his absence, the vice-president, be directed to place all the claims against delinquent stockholders in the hands of competent persons for collections, with directions to pursue the utmost limit in enforcing the payment of the same, allowing not over five (5) per cent. for collecting the same. When paid, all such sums shall be paid over to the trustees for distribution amongst the creditors according to the terms of the trust, the board deeming it just that all delinquent subscribers shall be required to pay up before new requisitions be made.

Adopted unanimously.

By Mr. Anderson—Resolved, That the president, or, in his absence, the vice-president, be instructed to apply to the General Assembly of Virginia, if practicable, on the first day of the ensuing session, to make such amendments of the charter as were indicated by the stockholders at their recent meeting, and in addition thereto, an amendment authorizing the company to buy in the stock of delinquent stockholders, if, upon legal advice, there be no objection thereto.

Adopted unanimously.

By Mr. Harman—Resolved, That the vice-president be directed to bring a suit for damages for ——— dollars against the Adams Express Co., or individuals of the same, provided eminent counsel

can be found to bring the suit upon a contingent fee of 50 per cent. with a certain fee of $500.

Adopted by following vote:

Ayes.	Noes.
Zimmerman,	Devries.
Marbury,	
Foley,	
Anderson,	
Harman.	

Wm. H. Perot was next elected by a unanimous vote president of the company, at a salary of twenty-five hundred dollars ($2,500) per annum. And Mess. Devries and Foley were appointed a committee to wait upon Mr. Perot, inform him of his election as president, and request his acceptance of said position. On motion, Mr. Harman was substituted vice Devries, as one of the Executive Committee of the company.

On motion, the meeting adjourned *sine die*.

J. V. H. ALLEN,
Secretary.

M. G. HARMAN,
Vice-President.

Com'r's Office,
Richmond, Va., Feb'y 21st, 1885.

Glenn's adm'r
vs.
National Express & Tranportation Company & als., } In chancery.

To the Circuit Court of Henrico:

Pursuant to the order made in this cause on this day, the undersigned has caused to be made the foregoing copy of the proceedings of the Board of Directors of the National Express & Transportation Company, at a meeting held on November 1st, 1866, as appears on the record book of said Board of Directors, being the same book produced by John J. Kelly, with his deposition taken before Com'r Kean on April 26th, 1880, and therein styled "Record N. E. & T. Co. Board of Directors," and I hereby certify that the foregoing is a true copy.

Given under my hand this 21st, 1885.

WM. J. LEAKE,
Com'r in Chancery.

Petition of Thomas J. Jennings and others, in the chancery court of the city of Richmond, April, 1884, referred to on p. 208, *supra*, of this record, and filed April 11, 1884.

In the Chancery Court of the city of Richmond:

W. W. Glenn's adm'r et al.
vs.
The National Express & Transportation Co. et al.

Petition of Thomas J. Jennings et al., filed 11th April, 1884.

By leave of the court—

Your petitioners, Thomas J. Jennings, Edward B. Purcell and Goode Bryan, of the county of Richmond, State of Georgia, respectfully represent that they are holders of certificates of the capital stock of the said National Express and Transportation Company, and as such holders interested in the proceedings in said cause had and to be had.

Petitioners were not served with any process in said cause, were not made parties defendant, and, living in a distant State, had no notice whatever of any kind of the pendency of said proceedings until in October, 1883, and then had the scant notice of a demand for an assessment decreed against them, without notice or day in court, which put them on inquiry; and now, at the first term of said court, after their ascertainment of the facts connected with the rendition of the partial or interlocutory decree in said cause, made on the ————————, by your honorable court, petitioners come by their counsel and petition to have the said cause reheard and the manifest injustice of said decree corrected, as well for petitioners as for all others like interested with them who may join petitioners under the proper orders of the court here to be granted; and for grounds entitling petitioners to have said decree opened and a rehearing had, petitioners aver that the record of said cause discloses the following, to-wit:

1. There was no appearance for any of the defendants in said cause against whom substantial relief was prayed.

2. There was no relief decreed against any defendant in said cause who did appear.

3. By the said decree a large number of judgments, aggregating in amount many thousands of dollars, to-wit: two hundred thousand dollars, or some such sum, were granted to various parties or persons who had never by proper proceedings become parties complainant in said cause before said judgments were granted in their favor against the said National Express and Transportation Company.

4. By said decree the report of the commissioner of said court was confirmed, in which report was incorporated a finding of an immense sum of money against said National Express and Transportation Company in favor of persons not complainants in said proceedings, and of whose claims no notice whatever of any kind was given to said National Express and Transportation Company before the time that they (said claims) were passed on by said commissioner, and adjudicated against said defendant company (and as a consequence against petitioners, if they shall be held to be stockholders in said defendant company) by the said decree, said sum being all of said amount decreed as the indebtedness of said defendant company, except the claim known as the Glenn debt, on which said suit was originally brought.

5. Petitioners are advised that the service of said complainants' writ was illegal on the parties defendant purporting to have been served; being advised that it appears of record in your honorable court that the officer perfecting such pretended service on the pretended officers or agents of said defendant company was at the time of such service the deputy of the administrator of the said W. W. Glenn; and being further advised, that under the laws of Virginia the title to personalty of estates vests in the administrator, and that it appears of record in this cause that said suit was regarding personalty.

6. Petitioners are advised that it appears from the record in said cause that the service on said defendant corporation was not in accordance with the statute in such cases made and provided.

7. Petitioners are advised that said decree is based upon a bill in equity lacking in substantial parties defendant; that it appears from the record that the substantial relief prayed was against the stockholders of the capital of said defendant company; that said bill averred there were no assets of said defendant company save the said capital stock; that said bill averred that there were stockholders in the State of Virginia, but that it appears from the record of said cause that no one of said stockholders was made party defendant as such; that no stockholder appeared and defended, and that the class against whom the only real relief was decreed was not sued nor served, nor by any representative appeared and defended.

8. Petitioners are advised that it appears from the record of said cause that said decree by default was granted without proof made to the court that the precedent conditions of the charter authorizing the said defendant company to sue and to be sued, to do business and contract debts, were ever complied with.

9. Petitioners are advised that it appears from the record in said cause that the original contract of subscriptions of stock were never placed in evidence before the court granting said decree, which said decree was based upon a report as to the said stock subscribers, and the said adjudicated indebtedness.

10. Petitioners are advised that said decree by default was granted in the absence of proof to the court granting the same; that the pretended officers, or agents, directors, cashier and president of said defendant company, by service (of the character aforesaid), on whom the complainants seek to bind said defendant company, were ever lawfully elected or appointed to their said offices, or ever acted as such in and about the affairs of said defendant company; petitioners being further advised that the question as to the legal existence of said corporation, its officers and agents, and who they were and how appointed or elected, was not, nor by its nature could not have been, submitted to the said commissioner, and that proof before said commissioner on that subject should not have operated as proof to the court in the granting of said decree.

11. Petitioners are advised that it appears from the record of said cause that all of said pretended indebtedness for which decree was had against said defendant company, except the said Glenn claim, was *prima facie* barred by the statutes of limitation, and that no proof was submitted to the court granting said decree relieving said claims of indebtedness from the operation of said statutes, but that the same appeared to be stale demands.

12. Petitioners are further advised that the court appointing the said John Glenn as trustee—the said Glenn being at that time a non-resident, to-wit: resident in the State of Maryland—had no jurisdiction of the person of said trustee, and no jurisdiction to make said appointment. And petitioners pray that complainants in said cause may be duly served with legal notice of this their petition, and required to show cause, if any they can, why this petition should not be granted. Said complainants being John Howard, Esq., administrator *de bonis non* of the estate of W. W. Glenn, deceased, the Baltimore and Ohio Railroad Company, and various others, as appearing from the records of said cause.

And petitioners verifying the foregoing grounds by the records of said cause here in this court remaining, pray that said *ex parte* decree may be set aside and a rehearing had, to the end that equity may be done, and will ever pray, &c.

A. H. COX,
Pet's Att'y and Counsellor.

At a Circuit Court of the county of Henrico, continued by adjournment, and held for the said county, January 27th, 1885.

Glenn's adm'r, &c., Pl't'ffs.
against
The National Express & Transportation Co. & others, Def'ts.

On motion of the complainants the other creditors whose claims

were established by the decree entered in this cause on the 14th day of December, 1880, it is ordered that the order entered at Rules on the last Monday in May, 1884, in the matter of the petition of Thomas J. Jennings, Goode Bryan and Charles B. Purcell be set aside, and by leave of court said complainants and creditors this day filed their joint and several demurrers and answer to the said petition, and the hearing of the same is continued until Tuesday, the 3d day of February next.

Demurrer and Answer to the foregoing petition.

In the Circuit Court of Henrico county:

Glenn's administrator and others
vs.
The National Express and Transportation Company and others.

In the matter of the petition or bill of Thomas J. Jennings, Edward B. Purcell, and Goode Bryan, stockholders of said company, in behalf of themselves and for all others in like interest.

The joint and several demurrer and answer of John M. Glenn, administrator d. b. n. of the estate in Virginia of W. W. Glenn, dec'd, (recently appointed as such in place of John Howard, who was appointed and qualified only for the special purpose of reviving the suit upon the death of John W. Wright, formerly administrator, and who was removed at his own request and in accordance with the understanding at the time of his appointment and qualification,) the Baltimore and Ohio Railroad Company, the Bank of Commerce (of Baltimore), Francis Murray, for the use of John R. Terry, &c.; Henry M. Bash, trustee; Luke H. Miller, the Philadelphia, Wilmington and Baltimore Railroad Company, the Richmond, Fredericksburg and Potomac Railroad Company, the Richmond and Danville Railroad Company, the Wilmington and Weldon Railroad Company, in behalf of themselves and all others, creditors of the said National Express and Transportation Company, whose claims against said company are established in this suit, to a certain petition or bill filed on the 11th day of April, 1884, by the said Thomas J. Jennings, Charles B. Purcell, and Goode Bryan.

The said demurrants, jointly and severally, say that the said petition or bill is insufficient in law, and ought not to have been permitted to be filed, and for reasons appearing upon its face and upon the face of the record in this suit, to which it refers, and which is to be considered in connection therewith, they, jointly

and severally, demur to the said petition, and pray that it may be rejected and dismissed with costs.

And without waiving, but still insisting upon their said demurrer, the said creditors, for answer to the said petition, say that they promptly, by counsel, entered their appearance to the said petition, at the May rules (1884), by a special appearance, filed in writing, prayed to be considered as part hereof, and that they were then, and have at all times since been, in readiness to give the said petitioners a hearing upon their said petition; and that as they promptly appeared to the same to prevent delay and expense, so they have ever been willing and anxious that that object should be accomplished by a speedy hearing, and that it has been by no fault or default on their part that such hearing has not before been had; and while they do not impute to the said petitioners intentional delay in this matter for wrongful purposes, certain it is that the delay has operated to the advantage of the petitioners by procuring continuances and preventing a trial of the suits in Georgia, brought by the trustee against them under said decree of the 14th December, 1880, because of the pendency of said petition in this suit; and certain it is that the pendency of the said petition has operated greatly to the detriment of these respondents and to the efficient execution of the said decree and of the trusts of the deed of trust of the company, which, by said decree, for the first time after a lapse of fourteen years, was placed in a condition to be executed. For, as will hereinafter more fully appear, the pendency of said petition, and others recently dismissed by this court, has disastrously retarded and in large part suspended the execution of the said decree, and of course the trusts of said deed, to the incalculable loss of the trust fund and the imminent danger of its inadequacy to satisfy the said trust: while all of the courts, before which, upon suits brought by the said trustee against stockholders by authority of said decree and said deed of trust, in which a trial has been had, have uniformly sustained the validity of the proceedings of the Chancery Court of the city of Richmond, in which the suit was instituted, the trial of a vast number of suits pending in the different States has been virtually arrested by the pendency of said petitions.

Respondents further state that already three several similar petitions have been filed by delinquent stockholders in behalf of themselves and others, and after a full hearing such redress was had by compromise as was satisfactory to them as representatives of all of the stockholders, as will be fully hereinafter shown, and respondents here *in limini* respectfully protest against the hardship and injustice of having, from time to time and term after term, to be called upon to answer petition after petition, without end, of a few out of a thousand stockholders of a company, whose only claim to *locus standi* in court is grounded upon their own laches and default

for nineteen years, in the performance of plain, legal, and moral duties of the highest obligation.

In the hope and trust that this will be the last of such petitions permitted to be filed, or entertained for any purpose, these respondents will proceed to answer the same, by way of convenience to this court, now new to the case (from recent transference to its jurisdiction), and to save time and labor in specially referring to the voluminous proceedings at large.

And in the first place, respondents say that it is true the said petitioners were not made parties defendant, and for obvious reasons; in the first place, they were neither necessary nor proper parties, and might have successfully demurred to the bill if they had been made parties, and secondly, because "living in a distant State" they were beyond the jurisdiction of the court, and could not by any means be served with process, if proper parties, which they were not.

The whole proceedings were had to obtain the due execution of the trusts of said deed of trust executed by the company on the 20th September, 1866, for the payment of its debts, and was brought by leading creditors in behalf of all secured by the deed against the company, its officers and the trustees in the deed, and it is new law, that in a suit to enforce the execution of the trusts of a deed of trust made by a corporation to pay debts or to foreclose a mortgage given by a corporation for the same purpose the stockholders in the corporation are either necessary or proper parties. By the very constitution and nature of such an organization, the corporation and the corporate agents represent the stockholders, who act and are acted upon only through them.

And now taking up *seriatim* the enumerated grounds of equitable interference in behalf of said three small stockholders:

1. As to the first ground, to wit: That there was no appearance for any of the defendants in said cause, against whom substantial relief was prayed, respondents say that the statement is not true in fact, because the trustees did appear, and important relief was sought and obtained against them in removing them from office, but that assuming the allegation to be entirely true, it is a matter for which these respondents are not responsible, as it was not in their power, nor was it their duty, if in their power, to compel the defendant company to appear and defend itself; and respondents further say, that if the petitioner and his co-stockholders did not choose to keep up an efficient directory for due attention to their affairs, it was their own fault and default, and they cannot plead their own laches as a ground for setting aside a decree obtained upon process against this company, duly served according to law. These respondents were constrained to take a decree against the company by default, or not at all, and they have yet to learn that a decree had by default, upon process duly served, is not as valid

and binding as any other on all the parties against whom it is so taken, and they are advised that if the law were otherwise, adversary judicial proceedings would be impossible.

2. As to the second allegation, to-wit: That there was no relief decreed against any defendant in said cause who did appear, respondents say the same is not true, because the trustees as aforesaid did appear, and practical and important relief was obtained against them in the fact of their removal; but if the allegations were true, respondents would be at a loss to see in the circumstance any reason to set aside said decree, unless the jurisdiction of the court, in the administration of justice, is to be made dependent, as now contended, upon the pleasure of the defendants sued, and can be defeated at will by their voluntary disregard of the process of the court.

3. In respect to the third allegation, to-wit: That judgments to a large amount were granted in favor of various parties who had never by proper proceedings become parties, the statement is wholly untrue, and must have been made in profound misconception of the nature of the proceedings had before a commissioner in Virginia, taking accounts under an order of court upon a creditors' bill of debts secured by a trust deed and to be paid out of the trust fund thereby granted for the purpose. The report of the commissioner of the 19th of June, 1880, was but the execution in the usual and regular way of the decree for an account of the debts and assets of the company entered 6th October, 1879, and in point of fact every claim proved before the commissioner and established by the court in its decree of December 14, 1880, was represented by counsel and known to be so both by the commissioner and the court, and the fact of such representation appears of record.

4. In respect to the fourth allegation, it is somewhat the same in substance as No. 3, and is based upon a like misconception of the nature of the proceedings under a creditors' bill and the common practice therein. The company was first duly served with process in the manner prescribed by law, and the cause having been duly matured, the said order for an account of debts and assets was entered on the 6th of October, 1879, and after due publication of the time and place of taking said accounts, the same were duly taken and reported, and the said company and all parties concerned had full legal notice of all the said proceedings in the manner prescribed by statute law and familiar in practice in Virginia.

5 and 6. Regarding the alllegations contained in specifications No. 5 and No. 6, of said petition, respondents are advised that taken together they constitute but one ground of contention; which is that process was not duly served upon the company because it was served by a deputy sheriff, whose superior officer was as administrator in Virginia of W. W. Glenn's estate the com-

plainant in the creditor's bill. But respondents say that here again the petitioners have entirely mistaken the law and practice thereunder in Virginia. The service of the summons as to the company was a good and valid service. The sheriff was not a party in his own right, and was party only as auxiliary administrator of a foreign intestate, who owed no debts in this State, and owned no property in this State, except the claim in this suit, but if the sheriff had been plaintiff in his own right, by the law of Virginia the summons might have been served as a notice is served, and a notice may be, and constantly is served, by the plaintiff himself.

And in the absence of an express statute authorizing this to be done, by the immemorial common law in force in the State, a sheriff, though plaintiff, may serve a summons in a suit. Here the sheriff was in point of fact merely a nominal and technical plaintiff (the real person to receive from the court or from the trustee in the deed of trust, being the Maryland administrator of said W. W. Glenn's estate), and the fact is that John M. Glenn, of Baltimore, Maryland, one of the children of said W. W. Glenn, is now the administrator in Virginia of said estate, and the further fact is that said sheriff, nominal plaintiff as aforesaid, was only one of many plaintiffs who were in legal effect all of the creditors of the company, in whose behalf the suit was brought, and who subsequently appeared therein and took the benefit thereof. The service was in accordance with the long usage and practice of the courts of this city, and of the said Chancery Court of the city of Richmond, in which the suit was brought, ever since it was a court, and no question was ever made about the regularity of such a service, until made in this case. But if the service was irregular, which is denied, the objection should have been made by the company itself by plea in abatement, and could not be made now even by it after a decree by default. Much less can it be made by defaulting stockholders, debtors to the company, in order evade payment of the company's debts out of a trust fund for that purpose wrongfully kept in their hands. And the objection, if valid, would be equally valid in an action at law by the trustee upon said assessment against said stockholders, as if made in this suit. But the objection is frivolous, as has been shown.

7. As to pretension No. 7, respondents are advised that all of the parties were before court necessary for the jurisdiction it assumed and exercised. All of the creditors of the company were duly brought before the court by the creditors' bill and the proceedings thereunder. The company was duly served with process, as were also the president and directors and the trustees, and the trustees appeared and answered the bill. The whole object of the suit was, in general terms, to obtain an execution of the trusts of said deed of trust executed by the company for the payment of

its debts, and to this end an assessment upon the unpaid subscriptions of the stockholders, conveyed by said deed as debts due to the company, and which, without such deed, were pledged by law to the payment of the company's debts.

And the novel proposition is now asserted that the debtors to the company who, by the act of the company, owe that fund to the trustee, were necessary individual parties to a suit authorizing the trustee to collect the trust funds in their hands; that is to say, in a suit against a corporation to enforce the payment of its debts out of the corporate property, it is necessary to have personally before the court all of the debtors to the corporation, because the money is to come out of them with which the debts are to be paid.

The petitioners, by becoming stockholders, without paying their subscriptions in full necessarily became debtors to the company according to the terms of the contracts of subscription. But the fact of such indebtedness, while it created an obligation of payment, conferred no rights upon the debtor as such. All of the rights of such a person were the inchoate rights of a stockholder, and accrued to him only in that capacity. And then the question arises whether, in a suit against a corporation to enforce the payment of its debts, the stockholders as such are necessary parties, and that question answers itself. The distinctive characteristic of a corporation or joint stock company of this kind, the chief, if not only fundamental, element and condition of its existence, is the faculty conferred upon a number of persons of contracting and being contracted with, and of suing and sued upon such contracts as one person, in the name and by the instrumentality of a collective agency, and its charter is but an agreement between them and the State by which the corporators or members of the company consent in advance to that mode of business and of procedure, and hence notification of legal proceedings, given in that mode, is binding on the collective body and upon each and all of its component parts. It is a great privilege and convenience for a multitude of persons to be able to contract and be contracted with, and to sue and be sued as one person, and to be liable only for a specified amount for the contracts thus to be made and enforced; and when contracts have been thus made and suit has thus been brought, and jurisdiction thus acquired to enforce them, it does not lie in the mouth of any member of the company to say, that in addition to suing and serving process upon him and his associates collectively, in the manner agreed upon before hand in their charter or articles of association, and thus after having fully obtained jurisdiction to enforce the social contracts out of the social property upon the express terms upon which those contracts were made and that property acquired, it was also incumbent on the creditors, who had trusted to and acted upon that agreement and basis of things, to sue each corporator individually in the same suit, and serve him

individually with process, as conditions precedent to jurisdiction over the corporate contracts and property. By the charter of this company, constituting with the general statute law of the State, its articles of association, it is expressly provided that J. E. Johnston and others named, and their associates, successors, and assigns should be a body corporate and politic, by the name of the National Express and Transportation Company, for the purpose of an express and transportation business, and as such to sue and be sued, plead and be unpleaded, contract and be contracted with, and should have power to make ordinances, by-laws and regulations for the government of all under their authority and the proper conduct of its affairs; and it was further expressly provided, that the said company should elect "stockholders to act as directors, who shall represent the said company and manage the business thereof;" and in pursuance of these provisions there was constituted and continued a president and board of directors as active managers of the company, having full power and charged with the duty of representing the company and taking care of all of its affairs. By the general law of the State and the express terms of said charter, said officers were to continue in office until their successors should be appointed. And by the general law of the State also said corporation was to continue in existence, and was to sue and be sued in respect of its contracts and property indefinitely until all of its liabilities should be enforced and its property distributed among those entitled thereto. It was upon these conditions and this basis and understanding that credit was given by the public to this company for whatever it required in the prosecution of its business, and it has been upon the same conditions, basis, and understanding that this suit was brought, and has been proceeded in to enforce the liabilities thus contracted. And these respondents are advised and insist that no one or any member of the more than one thousand persons who compose this company, and who are scattered over twenty-one States and two continents, can acquire any right to set aside the fundamental conditions aforesaid, or claim to be individually sued upon the corporate contracts, by reason of the failure and neglect on their part to keep up an efficient directory to represent them in respect of the business of the company and all litigation touching the same. By their laches and the dereliction of their agents, encouraged and permitted by their own acquiescence and example, they could neither deprive the creditors of the company of plain legal rights acquired under its charter and the general law of the land, nor create any new rights for themselves: And it would be monstrous if contracts authorized and made under a fundamental law, with one juridical person, and to be enforced by suit against one juridical person, the legal representative of a thousand or any number of natural persons, could thus, in defeat of law, right, and

justice, be converted into individual contracts made with the thousand natural persons, and be enforced only by suit against each *eo nomine*, scattered in different jurisdictions over the face of the earth and impossible to be reached by legal process. Respondents are advised that the stockholders of this company, after having agreed to be contracted with and to be sued in the manner above stated, and taking the chances of making a profitable speculation in that way, upon a limited liability, could not elect, when the speculation proved disastrous, to abandon the enterprise, throw all the burden of its losses upon their creditors, and by their negligence and default fail to keep up an active representative agency, and then claim immunity from the legal effect of a decree rendered against the company in accordance with the terms of their original agreement and the express provisions of statutes enacted to prevent such an outrage.

Said petitioning stockholders, being citizens and residents of Georgia, were in fact out of the jurisdiction of this court and could not personally be brought within it by any process of law, and it is not for them to complain either of not having been individually sued themselves or that other stockholders, residents of Virginia, were not so sued, when those stockholders have not chosen to make such complaint on their own account, and who, if they had been sued could have successfully demurred to the bill for having made them parties, which has been the law for two hundred years.

Upon the whole, respondents are advised and insist that said decree is a valid decree against the said company: that if it is so valid against the company, it is alike valid against the stockholders and they are bound thereby; that if it be not so valid, by reason of the personal absence of said petitioners, they can take advantage of the fact elsewhere and in every jurisdiction as well as in this suit; that they have been by their own agreement in advance embraced in the express terms of the charter of said company lawfully sued in the name and by the agency of the company, whose directory represents them in all things; and that the validity of these proceedings cannot be impaired by virtue of the nineteen years default of the petitioners in providing themselves better representatives, or by virtue of their neglect now to call upon those representatives to act or to take any steps towards replacing them by others more efficient in attention to the business of the company, or by virtue of the profitable immunity which the said stockholders have so long enjoyed and secured to themselves, simply by doing nothing towards the fulfillment of their clear duty, and by that means of interested laches, to the utter disregard of the rights of the creditors, have avoided the assessments necessary and proper to be made for the payment of the debts of the company, and which it would have been the first business of a faithful directory to make

and assist in enforcing by the trustees charged to collect the same. The pleadings, proofs, records, and proceedings had and filed in this case abundantly show that it was only after having been obstructed and baffled for fourteen or fifteen years by the officers of the company (allowed to remain in office by the stockholders) and by the original trustees in the deed of trust (selected *in invitum* as to the creditors), who were acting in concert with prominent stockholders that the creditors were at last enabled, by getting possession of the books of the company in 1879–'80, to obtain the evidence essential to the prosecution of this suit, the institution of which was rendered necessary by the said profitable laches of the stockholders and the co-operative inaction and default in duty of their agents and trustees. In point of fact, by a fraudulent general stockholders' bill against the company, its officers, and the trustees in said deed pending in the Circuit Court of the United States for the Eastern District of Virginia, from the 8th day of August, 1866, until the 11th day of December, 1880, the trustees in said deed were enjoined and restrained from proceeding to execute the trusts in favor of the creditors, and the injunction was then dissolved and the suit dismissed only on the motion of said creditors, in order that they might be disentangled by the pendency of those proceedings in the prosecution of these instituted by themselves. And a similar general stockholders' suit against the said company, its officers, and the said trustees, originally brought in a State court of the city of New York, in September or October, 1866, and afterwards removed to the Circuit Court of the United States for the Southern District of New York, is still pending, and a similar injunction is still in force. The substituted trustee appointed by the Chancery Court of the city of Richmond, and now executing the duties of his trust under the supervision of this court, has not been able to proceed against the stockholders in that State because of the pendency of that suit and injunction, and he has been deterred from appearing therein and asking for a dissolution of the injunction because of the successive petitions filed by different sets of stockholders in this suit praying for a rehearing of said decree of the 14th of December, 1880, and obstructing its execution in every possible way. During the unmolested pendency of the said stockholders' suit and injunction in the Circuit Court of the United States for the Eastern District of Virginia, the stockholders everywhere seemed to be content, as inaction in the collection of unpaid subscriptions for satisfying the debts of their company was continuing exemption on their part from doing their duty in bearing the losses of their speculation instead of casting them upon their creditors. But as soon as those creditors, after so many years of vain effort, succeeded at last in 1879–80, in obtaining the books of the company, and thus the evidence essential to the successful prosecution of this suit, that is to

say, essential to the ascertainment of the debts of the company, in order to the levying of a proper assessment, and to the discovery of the names and locality of the stockholders in the different States, the amount of their several subscriptions, the assignments of stock, and the several assignors and assignees thereof, all of whom are by express statute made responsible for the payment of the unpaid subscriptions; as soon as the long-baffled and defrauded creditors, having obtained these means of self-protection, proceeded regularly in accordance with the statute law and the general and established principles and practice of chancery, to have done by the court, what the official agents of the company, the company itself, its stockholders and its chosen trustees, had so long failed to do, and had obstructed and prevented from being done, and the decree of December 14th, 1880, was entered, and an efficient trustee appointed clothed with the power and duty of suing the defaulting stockholders for an assessment upon their unpaid subscriptions,—no sooner was this done than a new system of laches was set on foot by different sets of stockholders—that of filing petitions in this suit for a rehearing of said decree and the arrest of the whole proceedings.

All of the great labor, trouble and expense of this suit, necessitating besides large home expenses and costs, the employment of counsel and institution and costs of suits in twenty-one different States of the Union against recusant stockholders, would have been long ago avoided if the stockholders themselves had done their plain duty. And now when sued on the original decree of assessment in this suit of December 14th, 1880, as the said petitioners have been sued to compel the enforcement of a long-neglected and advantageous breach of legal and moral obligations of the highest dignity, they come forward at last, at the end of the law in their several States, and to avoid payment of the judicially ascertained debts of the company, seek to get rid of a decree rendered by default, when the default was due to their own long laches and neglect of duty, alike to the creditors and to themselves.

And they do this without offering any indemnity or security against the great loss and damage that must necessarily result from setting aside said proceedings, which would suspend or set aside also the hundreds of suits based thereon in the different States; render useless the large expenditures already made or incurred in costs and counsel fees therein, as well as in this, the mother suit; and without offering any indemnity or security against the infinitely greater loss and damage to the trust fund by reason meanwhile of the death, insolvency and embarrassments of other stockholders, during the delay incident to the pendency and prosecution of proceedings *de novo* in this court, at the instance of these three Georgia stockholders, of whose solvency nothing is alleged or known.

And respondents are reliably informed, and here state the fact to be, that the great majority of the Georgia stockholders are embarrassed, if not insolvent, and that it will be difficult, if not impossible, to collect from them by any process of law even the assessment made by said decree.

Respondents, in this connection, beg leave to refer, as if herein incorporated, to the various official reports made by John Glenn, trustee, showing the condition of the trust fund and also showing how absolutely necessary it is that the promptest and most efficient steps should be taken for the further collection of the trust fund necessary to pay the large indebtedness of the company, and the great expenditure of litigation and costs in collecting the same. It is extremely doubtful, indeed, whether the whole of the solvent subscriptions will pay the debts of the company and the expenses of enforced collection. And it is under these circumstances that three only, of a thousand stockholders, and these in a distant State, and who dispute the fact of their being stockholders at all, gravely ask this court to set aside all of the proceedings of the chancellor of the Chancery Court of the city of Richmond regularly had in this cause, and all of the proceedings based thereon already had in this honorable court since the cause has been transferred to its jurisdiction.

8. In regard to the allegation that it appears from the record that said decree by default was granted without proof being made to the court that the precedent conditions of the charter authorizing the said defendant company to sue and be sued and to do business and make contracts were ever complied with, respondents say that the fact of the legal organization and existence of said company was not put in issue in this suit, and could not, indeed, have been thus collaterally inquired into. But if the fact of such organization, or any fact necessary to show the same had been put in issue, it would have been proved.

9. In respect of the allegation that it appears from the record that the original contracts of subscription were never placed in evidence before the court granting said decree, respondents are advised that the same is wholly immaterial. By express statute the persons in whose names shares of the stock stand on the books of the company are the owners thereof as regards the company, and the commissioner properly reported to the court from the books the stock thus appearing to have been taken and held; but neither the commissioner nor the court undertook to indicate or determine who were or are the stockholders in said company, which, indeed, would have been an idle absurdity and impossibility. When persons are sued upon said decree as stockholders, it will be open to them to show, if they can, that they were never owners of stock in the company, and if successful, will defeat the suit. That course is entirely open to the petitioners in the suits brought against them

by the trustee, in the State of Georgia, and the jurisdiction to pass the said decree in no manner depended upon the fact whether or not the petitioners, or any of them, were original subscribers to said stock, or whether or not their original contracts of subscriptions were before the court when rendering said decree.

10. In reference to the intimation in said 10th specification, respondents say that in point of fact full proof was before the commissioner, in the books of the company, and otherwise, of the legal existence of said company and of the regular election of the officers named in the original and amended bills, and that ample proof appears in the record of every jurisdictional fact necessary for the maturity and proper hearing and adjudication of the suit, and the court so held in the said decree, wherein it is recited and determined that the cause had been regularly matured and proceeded in as to all of the defendants. Said petitioners do not venture to make any averment to the effect that said corporation has no legal existence, or that its said officers were not duly elected, but only that proof was not furnished as to the same. Respondents are advised that the legal existence of said corporation is a matter that can not be inquired into in this collateral way, but that if it could be, it was not necessary to furnish proof of a fact not put in issue by the pleadings, and that for all of the purposes of this suit, it was sufficient to aver and show that the said company acted as a corporation, and that in the absence of its reputed president, the summons against it was duly served upon the only cashier it had in the city of Richmond, and also upon one of its directors, resident in said city; and respondents say that not only was this done, but that for four successive weeks a copy of said summons was duly posted, and was also duly published in the Richmond *State* newspaper, published in the said city, which of itself, in the absence of a proper officer upon whom service could be made, would have been, by express statute a good legal service upon said company.

11. As to the intimation that the claims established by the said decree, except the Glenn claim, were barred by limitations, respondents say that no plea of limitations was filed to any of said claims, but that if such plea had been filed, all of said claims were secured by the deed of trust mentioned in the proceedings, and that as to remedies against the trust fund thereby dedicated to their payment, no statute of limitation has any application, and that the remedy under said deed of trust will not be affected by any lapse of time short of the period sufficient to raise the presumption of payment. And it abundantly appears by the record that all of the delay in the prosecution of said remedy arose from the illegal and wrongful conduct of the officers of said company, and the trustees of said deed alike in failing to execute said trust and in thwarting the efforts of the creditors to enforce execution of the same by concealing and withholding from them the stock

and other books of said company, which, indeed, were only made accessible for the purposes of this suit in the fall of the year 1879, when, for the first time since 1867, they were produced by the surviving trustees. For a brief period in 1866, and 1867, the said books were in the possession of a receiver of said company, appointed by the Circuit Court of Baltimore, but the order of his appointment was soon revoked and set aside by the Court of Appeals of Maryland, and the said books restored to the trustees, who, ever since, until the fall of 1879, as aforesaid, acting with the knowledge and approval of the president and other officers of the company, refused to permit any creditor to have access to them. And, in the meanwhile, the stockholders of said company, including the said petitioners, have enjoyed the advantage, now sought to be indefinitely prolonged, of keeping in their pockets the trust fund dedicated alike by the law and by said deed to the payment of the debts of the company, and by abandoning their duty and supinely doing nothing, have acquiesced in and secured the profitable wrong of hindering, delaying, and defrauding the creditors, now pleaded to perpetuate that wrong. When said petitioners subscribed for their stock in said company, they well knew it was to be paid for only as called for by the president and directors, and in point of fact, it appears from the books of the company that all of them actually paid one or more assessments thus made upon them. As stockholders, they afterward knew that the company stopped business, leaving a large amount of debts contracted and unpaid. With this knowledge they have permitted those debts to remain unpaid, thus throwing the losses of their speculation upon the public. They have failed to keep up an efficient directory to attend to their affairs, and have thus escaped any further assessments. Their agents have prevented the creditors from finding out the names and localities of themselves and their associate stockholders by withholding the books of the company. And after having in this manner obtained immunity from honest payment of their debts for nineteen years, they now come forward and ask that a decree establishing those debts should be set aside more than four years after it was entered, in order that, in the place of their legal representatives, they may plead the statute of limitations!

Respondents are advised, as before stated, that neither the said petitioners nor any other stockholders were necessary parties to the said suit at the time said decree was rendered, and that the same is valid and binding upon the company and all of its stockholders. Respondents are further advised, that no stockholder, or set of stockholders, is entitled to be permitted now to come in and ask either for a rehearing or a review of said decree; that the only lawful party to take such a proceeding is the company represented by its president or other proper officer, and that if such action was

thus taken by the company, it would have no ground to stand on; that the said decree, by default, having been duly obtained according to law, is as valid and binding in law as if obtained after appearance and contest by the company; that the omission or neglect of the company to appear and defend the suit was the omission and neglect of all the persons composing the company, whose duty it was to have an efficient directory in office for the purpose of attending to the company's affairs; that to permit now one set of stockholders to appear and attack the said decree would be to open the door wide for different sets at as many different times and in such numbers as might suit their convenience or fancy, to do the same thing, and any decree that this court might enter would be subject to the same successive and unending guerrilla warfare, in which no victory of the creditors could settle anything, so long as any of the thousand stockholders of this company remained to come forward and ask to renew the attack; while, in the meantime the debts of the company, admitted to be of large amount, would go indefinitely still longer unpaid and the solvent stockholders become fewer and fewer the greater the delay thus effected, to the advantage and immunity of these defaulting speculators upon the public, whose nineteen years dereliction of duty is made the claim for continued dereliction.

This course has already been pursued in this case by several separate sets of stockholders as above stated, and the relief they were content to take was granted to them and to the whole body of the stockholders in whose behalf they assumed and were permitted by the court to act. That relief was within six months from the 21st day of July, 1883, to get a release from the trustee of all indebtedness to the company, upon payment of twenty-five per cent. of the same to the trustee. These respondents consented to that decree and are bound by it, and they are advised and insist that, under the circumstances, all of the stockholders are also bound thereby. For while the court reserved for future consideration all questions raised by the petitions of said stockholders, yet all of said stockholders united in consenting to said decree as a compromise for the benefit of themselves and of the whole body of the stockholders in whose behalf said petitions were filed and who in legal effect and contemplation were represented by said acting stockholders. Actual notice of said compromise was given to the present petitioners as well as generally to stockholders at large. All who desired had an opportunity to take advantage of the action thus taken by some in the name and on the behalf of all. Respondents are advised and insist that unless each successive set of stockholders who may choose to take the chances of profiting by a like proceeding is to be permitted term after term and year after year to obstruct the course of justice and arrest the administration of the trusts of said deed, it must be held that the end of

such proceedings has already been reached by the said decree of July 21, 1883.

Respondents are advised and insist that if, contrary to their most earnest and respectful protest, said petitioners should be allowed further to proceed in their undertaking, it should be only on being put upon terms to indemnify and save harmless these respondents for any loss or damage they may suffer in the premises, and upon giving ample security for the same, and also to pay the costs that may be incurred in this court and the Court of Appeals, should the case go to that court. By coming into this suit, in which they were not necessary parties, and, as these respondents are advised, were not proper parties, they have become actors and are amenable to the rule that they who seek equity must do equity. It is just not only that they should be required to pay what they owe to said company, but also the increased costs of this suit, and to furnish security ample to protect and indemnify all interested in the trust fund against loss to that fund by reason of the suspension of the proceedings instituted by the trustee to collect the assessments authorized by said decree of December, 1880, or by reason of loss by the prevention of further assessments now known to be necessary to complete said fund.

As to specification No. 12, objecting to the appointment of John Glenn as trustee because he is a resident of the State of Maryland, respondents respectfully say that the great majority, in value, if not in number also of the creditors, are residents of Maryland; that said Glenn was the unanimous choice of all of the creditors; that he gave bond in the penalty of $100,000 for the faithful performance of his duties as such trustee, with sureties qualifying to responsibility for $300,000; that he has so far fulfilled his duties with rare intelligence, diligence and fidelity, to the entire satisfaction of the court and the creditors, and to the dissatisfaction only of defaulting stockholders upon whom the due exercise of the faculties fitting him for the office is their only cause of complaint against him, and that such complaint is only compliment and commendation; and that if the said three small Georgia stockholders, or any other stockholders, will only pay to the said trustee what is now, or may hereafter by future calls, become due to him by reason of assessments upon their unpaid subscriptions, these respondents hereby engage to release them from all obligations to pay anything more on said subscriptions, so far as these respondents are concerned, and the receipt of the trustee for the same will constitute a full bar to any other or further claim for the same.

THE SAID DEMURRANTS AND
RESPONDENTS ABOVE STATED.

January 28, 1885.

Affidavit to the foregoing answer is hereby waived.

A. H. COX,
Sol. for Compl'ts.

Richmond, January 21, 1885.

Original and full report of the Business Committee referred to on pp. 97, 98 of the printed record, and filed as an exhibit with answer of the creditors to petition of Jennings and others.

The business committee having examined into the affairs of the company, as well as the limited time at their disposal has enabled them to do, beg to make the following report:

No. of shares subscribed for,	43,556	
On which calls have been made of 20 per cent., amounting to	$871,120 00	
Amt. actually paid on said calls,	$534,748 00	cash
In notes of the parties,	54,436 00	
Making	$589,184 00	
Calls in arrear amount to	281,936 00	
	$871,120 00	
Nothing whatever has been paid on	557	shares
The directors agreed to consolidate	3,512	"
No. shares on which calls have been paid,	39,487	"
	43,556	"
No. shares on which all calls have been paid,	15,188	
" " in arrear,	28,368	
	43,556	
Indebtedness of Co. as reported by its officers,	$273,000 00	
But the Committee think it safe to assume them at	$300,000 00	
Further debts to accrue by Nov. 1st, 1866,	25,000 00	
Estimated loss on leases and contracts,	25,000 00	
	$350,000 00	

The property of the Co. cost, according to books,		$212,000 00
Other assets representing,		55,000 00
		$267,000 00
Assumed to produce,	$100,000 00	

The committee are informed by counsel that the company has no power to reduce the capital stock below one-third of the $5,000,000 required by the charter, say $1,667,000. They are further informed by counsel that the par value of each share cannot be made less than $100 as prescribed in the charter.

In order therefore to consolidate the stock the committee recommend that the 43,556 of subscribed shares be reduced to one-fourth that number, say 10,889 to be accomplished by the surrender of four shares on which $25 each has been paid and the issue in lieu thereof of one share of full paid stock of one hundred dollars. In order to effect this, and to raise a fund in addition to the assets now in the hands of assignees, to pay the entire indebtedness of the company, a further call of $5 per share on the 43,556 subscribed shares be at once made, making $25 in all.

The above proposition would, however, reduce the amount of stock below the one-third required by the charter. The committee therefore recommend that six hundred thousand dollars of preferred stock, bearing 8 per cent. interest, be issued in six thousand shares of one hundred dollars each to be sold at not less than par. This will increase the stock to the amount required by the charter and provide means for the successful prosecution of the company's operations.

They further recommend that a committee of five, consisting of one director, three stockholders, or proxy, not directors, and the superintendent, be appointed to negotiate for the sale of the preferred stock at once. Failing in the disposal of the preferred stock the president and board of directors will at once take such steps, by additional calls or otherwise, as may be necessary to enable the trustees to liquidate every just demand against the company and dissolve the corporation.

F. C. BARBER,
Chairman Bus. Committee.

Richmond, Va., October 10, 1866.

To the Chairman of the Meeting of Stockholders of the National Express and Transportation Company.

Depositions filed in open Court February 19, 1885.

In the Circuit Court of the County of Henrico:

Glenn's adm'r and others
v.
The National Express and Transportation Company and others.

In the matter of the petition of Thomas J. Jennings, Goode Bryan, and Charles B. Purcell.

To the said Thomas J. Jennings, Goode Bryan, and Charles B. Purcell:

Gentlemen,—Please take notice that on Saturday, the 31st of January, 1885, we shall, at the office of O. G. Kean, Esq., Goddin Building, at the corner of 11th and Bank streets, in the city of Richmond, between the hours of 9 A. M. and 5 P. M., proceed to take the depositions of Edward H. Fitzhugh, P. P. Winston, L. P. Winston, and others, to be read as evidence in our favor on the hearing of the above entitled matter, and that if from any cause the taking of the said depositions should not be commenced on that day, or if commenced, not completed, the same will be continued from day to day and from time to time at the same place and between the same hours until completed.

Respectfully yours,

THE COMPLAINANTS IN THIS SUIT, CREDITORS, &c.,
By Counsel.

Richmond, January 29, 1885.

Executed January 29, 1885, by delivering to Joseph Christian, counsel for the within named petitioners a copy of the within notice.

LEWIS P. WINSTON,
She'ff city of Richmond.

In the Circuit Court of the county of Henrico:

Glenn's adm'r and others
v.
The National Express and Transportation Company and others.

In the matter of the petition of Thomas J. Jennings, C. B. Purcell, and Goode Bryan.

To Thomas J. Jennings, C. B. Purcell, and Goode Bryan, Esqs.:

Gentlemen,—Please take notice that the depositions of Benjamin H. Berry, P. P. Winston, and L. P. Winston, taken by us at the office of O. G. Kean, Esq., in the Goddin Building, cor. 11th and Bank streets, in the city of Richmond, Va., in pursuance of notice theretofore given you, have been kept open, and will be kept open, for re-examination and cross-examination of said witnesses until the 19th day of February, 1885. Should it be desired by you, said witnesses will be recalled and re-examined and every opportunity given you for cross-examination, or at your option, they may be cross-examined upon their testimony already given. The notary is Conway Sands, Esq., cor. of said 11th and Bank streets, who will cause the witnesses to attend at any time you may appoint between this and the said 19th February, 1885.

Respectfully yours,

JOHN M. GLENN,
Adm'r, &c., of W. W. Glenn, dec'd, and the other compl'nts creditors of said defendant company.

By CARRINGTON & FITZHUGH and JOHN HOWARD,
Their Counsel.

Richmond, February 14th, 1885.

State of Virginia, city of Richmond, sct.:

I, F. H. McGuire, a notary public in and for the city aforesaid, do certify that Edgar W. Carrington, of lawful age, this day made oath before me in my said corporation, that on the 14th day of February, 1885, he delivered to Judge Joseph Christian, attorney and counsellor at law, a true copy of the above notice.

Given under my hand this 16th day of February, 1885.

F. H. McGUIRE, N. P.

The deposition of P. P. Winston, L. P. Winston, and others, taken before me, Conway R. Sands, a notary public for the city of Richmond, pursuant to notice hereto annexed at the office of O. G. Kean, Esq., in the city of Richmond, on the 31st day of January, 1885, between the hours of 9 A. M. and 5 P. M., to be read as evidence in behalf of the complainants, creditors, &c., in the suit of Glenn's Adm'r and others, v. The National Express and Transportation Company and others, depending in the Circuit Court of Henrico county, Va., wherein Glenn's Adm'r and others are plaintiffs and the National Express and Transportation

Company and others are defendants, in the matter of petition of Thomas J. Jennings and als.

JOHN HOWARD, Esq.,

Counsel for complainants in above entitled suit and others creditors of said company whose claims were established by the decree of December 4th, 1880.

Mr. P. P. Winston, being duly sworn, deposes and says as follows:

1st question by Mr. Howard. Please state your residence, age and occupation?

Ans. I reside in the city of Richmond, I am fifty-six years old, and am deputy sheriff of the city of Richmond.

2d Ques. by do. How long have you been connected as an officer with the office of sheriff of the city of Richmond? Please state when your connection with that office commenced, and what positions you have held therein.

Ans. My connection with the office commenced about 1846–47 as deputy sheriff. I have been connected with the office ever since that time, except during the war and three years before the war; it being about seven years altogether that I was out of the office; the rest of the time I either held the office of deputy sheriff, or of sheriff, and have personally executed the duties of the same. During a part of that time the sheriff of the city of Richmond and the county of Henrico was the same person; and he and his deputies executed all the duties of sheriff in all the courts alike in the city and county, except in the Hustings Court of the city of Richmond.

3d Ques. by do. During the time you have been connected with said office, what has been the usage and practice, or manner of serving writs in cases in which the sheriff was plaintiff by virtue of his office, *i. e.*, as adm'r or executor, c. t. a., suing in behalf of the estate? State to whom, in such cases, have the writs been directed and by whom executed.

Ans. Since 1865 the universal practice has been to direct writs to the sheriff of the city of Richmond, and they have been uniformly served on the defendants by the deputy sheriff, and my recollection is, that that was the rule also before the war.

And further this deponent saith not.

P. P. WINSTON.

Mr. Benjamin H. Berry, having been duly sworn, deposes and says as follows:

1st Question by Mr. Howard. Please state your name, age, residence and occupation.

Ans. Benjamin H. Berry. I am thirty-nine years old; reside in the city of Richmond, and am clerk of the Chancery Court of the city of Richmond.

2d Ques. by do. How long have you been connected with the Chancery Court as clerk, and state if you have acted as clerk in other courts?

Ans. I have been clerk of said court ever since 1870. I qualified as clerk of the court in July, having been elected in May. I was clerk in other courts from 1863 up to that time.

3d Ques. by do. Please state what has been the usage, practice, or manner of directing and executing writs in the Chancery Court of the city of Richmond during the time you have been clerk thereof, in cases in which the sheriff of the city of Richmond, by virtue of his office, has been plaintiff, *i. e.*, as adm'r or executor of deceased parties, suing on behalf of the decedent's estate. State to whom the writs in such cases are directed, and by whom executed on the defendants.

Ans. They are directed to the sheriff of the city of Richmond, and generally executed by his deputy. So far as I know, that has been the universal custom.

4th Ques. by do. Was or not such the usage and custom in other courts of the State in which you acted as clerk?

Ans. Yes, sir, it was the same custom. During the twenty odd years in which I have been connected with clerks' offices that has been the universal custom.

5th Ques. by do. Look at the writ and service thereof, to be found on pages thirty-two and thirty-three, of the printed and certified record in this cause, and state whether or not the writs there appearing to have been executed upon the National Express and Transportation Company, was directed and executed in the usual way in cases in which the sheriff is plaintiff in the manner above stated?

Ans. I have examined the writ and am satisfied that it was directed and executed in the usual way.

And further this deponent saith not.

BENJ. H. BERRY.

Lewis P. Winston, Esq., another witness, being duly sworn, deposes and says as follows:

1st Ques. by Mr. Howard. Please state your name, age, residence and occupation?

Ans. Lewis P. Winston; I am twenty-nine years old, reside in the city of Richmond and am at present sheriff of the city of Richmond.

2d Ques. by same. Please state how long you have been con-

nected with the office of sheriff in the city of Richmond, as sheriff or deputy.

Ans. Fifteen years; during which time I was deputy fourteen years, and sheriff about one year. During the whole of this time, before I was elected sheriff, I was the principal deputy.

3d by do. Please state what has been the usage and practice during that time of directing and executing writs in cases in which the sheriff, by virtue of his office, has been personal representative, suing for the benefit of the estate of deceased persons. State to whom the writs have been directed and by whom they have been executed on the defendants.

Ans. Writs were universally directed from the Chancery Court of the city to the sheriff, and were executed by me as deputy. That has always been, and is now, the custom. In such suits brought in my name, my deputy executes the writs on the defendants; and I have always understood that was the previous custom in the office.

4th Ques. by do. Please look at pages thirty-two and thirty-three of the printed and certified record in this case, at the writ there appearing to have been executed on the National Express and Transportation Company, and also inspect the original writ and return now shown you and state whether or not the said writ was directed and executed in the manner above stated by you?

Answer. I have inspected the said writ and the return thereon, the original of which I now hold in my hand, and perceive and state that it was directed in the usual way and was executed by me on the said company.

5th Ques. by do. Please state whether or not you recollect to have executed personally that writ?

Ans. I distinctly recollect the fact. I made particular inquiries as to who were the officers of the said company, and the matters stated in the return are strictly true.

And further this deponent saith not.

LEWIS P. WINSTON.

State of Virginia,
City of Richmond, to-wit:

I, Conway R. Sands, a notary public for the city aforesaid, in the said state, do hereby certify that the foregoing depositions were taken and sworn to and subscribed before me at the times and place mentioned in the caption thereto, and I do further certify that the said depositions were kept open in conformity with the notice hereto attached until the 19th day of February, 1885.

Given under my hand this 19th day of February, 1885.

CONWAY R. SANDS, N. P.

Notary's fee for taking depositions, $5.

Decree of March 4, 1885, and opinion of Court.

In the Circuit Court of Henrico county, continued by adjournment and held for said county, March the 4th, 1885:

Glenn's Adm'r and Others v. National Express and Transportation Company and Others.	In the Circuit Court of the County of Henrico.

This cause came on this day to be heard on the papers formerly read and upon the petition of Thomas J. Jennings, E. B. Purcell, and Goode Bryan, and the demurrer and answer thereto of the complainants and the joinder of the said petitioners in said demurrer (there being no replication to said answer), and upon exhibits and examinations of witnesses filed, and by consent of parties by counsel was set down for argument, and was argued by counsel.

On consideration whereof, for reasons expressed in writing, herewith filed and made part of the record though not to be spread upon the order-book, the court doth adjudge, order, and decree that the said petition be dismissed and that the complainants recover of the said petitioners their costs in the matter of the said petition expended. But this decree is to be without prejudice to any subsequent application of the petitioners or other stockholders to reopen the decree entered in this cause on the 14th day of December, 1880, so far as may be necessary to inquire into the validity of any of the debts against said company recognized in said decree; such application to set out sufficient reason to justify the court in reopening the decree for said purpose, and to be accompanied with a tender of adequate security to pay all costs awarded to any party, and all damages sustained by any party by reason of such application, and in other respects to abide the judgment of this court.

And liberty is given said petitioners, or any other stockholders, to take such steps as they may be advised for requiring the surviving trustees, in the deed of trust in the proceedings mentioned, to render such further accounts as may be deemed proper, upon like terms as are above prescribed.

And the petitioners desiring to appeal from so much of this decree as dismisses their petition with costs, the court, on their motion, suspends that portion of this decree for twenty days from the date hereof; provided the said petitioners, or some one or more of them, or some one for them, shall give bond with good security, in the penalty of three thousand dollars, in the mode and with conditions prescribed by law.

Glenn's adm'r and others
v.
National Express and Transportation Company and others. } Opinion of court.

This cause has been transferred to this court by order of the Chancery Court of Richmond, of June 27th, 1884.

It comes before this court now upon the petition of Jennings and others, three citizens of Georgia, asking to set aside and rehear the decree of the Chancery Court of Richmond, of December 14, 1880.

That decree established the validity of the deed of trust of the defendant company of September 20, 1866; construed the deed as a conveyance of all the property of the company, including the unpaid subscriptions of stock; approved a report of its commissioner of the debts due by the corporation, and finding, in the absence of other property of the corporation, that it was necessary for the payment of these debts to resort to the stockholders for their unpaid subscriptions, substituted a trustee for the original trustees designated in the deed, and assessing upon the stockholders a contribution of thirty per cent. of their subscription, ordered the trustee to collect the same by suit or otherwise.

The substantial justice of this decree, as to the greater part of the creditors against the corporation, and the necessity of resorting to the stockholders to pay them, has not been, and cannot be, made matter of controversy. It is idle to cite authorities to sustain the fundamental principle of corporation law, that the unpaid subscriptions of stockholders are debts due to the corporation out of which the creditors have a right to be paid.

The only substantial objections to this decree are the allegations that the indebtedness of the corporation is less than that reported by the commissioner and confirmed by the court, and that the assessment upon the stockholders, made by the court, is therefore too large.

If this indebtedness of the corporation be less than the commissioner reported, it does not necessarily follow that the decree was wrong in the assessment made upon the stockholders. It is abundantly apparent that some assessment upon the stockholders was necessary.

To the extent of every dollar of their unpaid subscriptions they were holders of funds to which creditors had a right to resort. The assessment upon all of them was designed to call in these funds ratably, so as to equalize between the stockholders the common burden. If the assessment decreed by the court yields too large a sum to satisfy creditors, the stockholders will reclaim their

over-payments, if there be any over-payment. Whatever the hardship or suffering of the stockholder in making it, the rights of the creditor are of superior dignity, and in the interest both of stockholder and of creditor, it is better to have the assessment made at once abundantly adequate to discharge the debts of the corporation. *Kennedy* v. *Gibson*, 8 Wall. 505. It is now very questionable whether, viewing this record in the best light for the stockholders, the assessment ordered by the decree of December, 1880, will yield the sufficient sum, and it may be that a subsequent assessment will be necessary.

The petition in this case was allowed to be filed by the Chancery Court of Richmond April 11th, 1884. If this order had not been entered, and I were now called to consider the application to file this petition against the objections of the plaintiffs, I do not think that the leave to file ought to be given.

The petitioners do not even ask to be admitted as parties to the cause. They do not even admit that they are stockholders in the company. The petitioners are residents of another State, and the enforcement of the decree of which they complain was contemplated by the decree to be had in another forum. Their language is carefully guarded, therefore, so as to reserve to themselves defences in the courts of Georgia which the courts of Virginia upon their own application to hear them might reject. But in despite of their guarded language they have voluntarily subjected themselves to the jurisdiction of this court, and if no demurrer had been interposed, and the petitioners had been required to reply to the answer, and issue had been forced upon that, I would have been compelled to hold them to the jurisdiction of this court, and could not have dismissed them from the cause until after enquiry before a commissioner and ascertainment of their liability a decree could be entered against them, which would conclude all controversy as to them in the courts of Georgia.

But the demurrer has been interposed, and no replication to the answer has been entered, and in this condition of the pleadings the case, after elaborate and able argument, has been submitted to the court.

It was practically conceded in the argument that the stockholders were not necessary parties to the case, and that the decree complained of is conclusive against them when sued upon in other courts, of this or any other State. If it had not been so conceded the well considered judgment of the Court of Appeals of Maryland and the able and exhaustive opinion of Judge Alvey, concurred in by all of his brother judges in *Glenn* v. *Williams*, 60 Md. 119, would relieve me of any necessity to extend this opinion upon this point.

This opinion of the Maryland court appears to have been accepted, and its judgment followed in the United States courts of Louisiana, *Glenn, trustee*, v. *Soule*, 22 Fed. Rep. 417, and of Dis-

trict of Columbia in the case of *Glenn, trustee*, v. *Busey*, and in a State Court of California.

But it is urged that the decree against the corporation was practically a decree by default, and that the stockholders, who had no knowledge of the proceedings and no opportunity to protect their interests, should now, in the same court which rendered the decree, be permitted to be heard.

It is insisted that the corporation was never properly before the court, and that the court was without jurisdiction to render the decree. If this be so, it is never too late for the court to retrace its steps, and in whatever manner the fact is brought to the attention of the court, whether by a party to the cause or the suggestion of any outsider either as *amicus curiæ*, or otherwise, it is the duty of the court *ex mero motu* to rescind its action.

I am of opinion, however, that this corporation was properly before the court. Even if we were justified in considering the corporation as having expired or dissolved, the 31st sec., 56 ch., Code of 1873, continued its existence as long as might be necessary to enforce its liabilities and distribute its property among its creditors. The proceedings by or against it were required by the statute to be the same, whether it was a "living" or, as learned counsel for petitioners phrase it, a "going" corporation, or an expired corporation.

Now, ch. 166, sec. 7, Code, 1873, provides how process against a corporation must be executed. By the act of incorporation the city of Richmond was made the *habitat* of the principal office of the company. If the president of the company had been found here, process could have been served upon him. In his absence it could have been served upon the cashier or treasurer, and if there were none such, upon a director of the company. The act further requires, in order to render the service valid, that the return should show on whom and when the service was made, and that the persons so served were residents of the sheriff's bailiwick. Now this process was served upon M. B. Poitiaux, as cashier, and upon Joseph R. Anderson, as director, and the officer's return shows that both of them were residents of the city of Richmond; that it was executed upon both of them in the city of Richmond, August 8, 1879, by delivering to each a copy of process, and that the president of the company was not a resident of Richmond. Both Mr. Poitiaux and Gen. Anderson appeared and answered, and while they disclaimed right to answer officially, recognized in their answer the service upon them officially of the process in the cause. Now, if Mr. Poitiaux was the cashier or treasurer of the company, service upon him was sufficient. If he was not, there was no such officer of the company within the sheriff's bailiwick, and service upon a director was sufficient.

Gen. Anderson, in his answer, does not deny that he was a di-

rector. He admits that he had been, but states his belief that he had resigned. This answer, however, is sufficient to throw upon the plaintiffs the burthen of showing that he was a director when the process was served. With that *onus* upon them, the evidence in the record is abundantly sufficient. Gen. Anderson appeared as director in the very last meeting of the directors which was ever held, and that meeting was subsequent to the last meeting of the stockholders. He could, therefore, never have divested himself of his official relation to the company.

As to the objection that the service of process was invalid because made by a deputy of Mr. Wright, who, as sheriff, and administrator of Glenn was plaintiff, I think it is entirely without merit. No objection of this character has ever, so far as I have heard, been made in Virginia before. It is a matter of every day practice in every court in the Commonwealth, and has been from the earliest days of the State. The concurrence of professional opinion, both of the bar and the bench, through these many years, is alone sufficient to repel the idea that the practice had been in violation of law.

The summons being merely serviceable process might, at common law, well have been executed by the sheriff himself, though plaintiff in the suit, independently of our statute authorizing a summons to be served as a notice is served, which may be and is constantly served by the plaintiff. See Sewell on Sheriff, 46 Law Library, 88–89; *Mayor, &c.*, v. *Bubb*, 1 Dowl. Practice Cases, 151; *Mayor, &c.*, v. *Williams*, 17 E. C. L., (10 Moore) 266; Code 1873, ch. 166, § 5, § 2, § 6, ch. 163, § 1.

The corporation was then, in my opinion, undoubtedly before the court. But the answers of Poitiaux and Anderson made patent the fact that the corporation was not a *going* corporation, and I think that the attention of the learned chancellor ought to have been called at once to these answers, and enquiry had as to the facts upon which the jurisdiction against the corporation was assailed. And when it did appear that this dormant, if not dead, corporation was before the court, by service of process, upon officers who disclaimed right to represent it and refused to represent it, and that being before the court, creditors are asserting their right to have ascertained and determined the large amount of its asserted indebtedness, and that the only possible means of payment of their debts was by assessments on hundreds of absent stockholders, I think the court ought to have required the officers of the company, upon whom process had been served, to retain counsel to protect the interest of the company and its absent stockholders, with a pledge of compensation to counsel out of the assessments to be made upon these stockholders.

This, however, was not done, and the case proceeded to hearing

before commissioner and court without the appearance at any stage of the investigation of any party to represent the interests of the stockholders, and resulted in the ascertainment of the decree of December, 1880, of an indebtedness of some $500,000, and the necessity of a call upon stockholders scattered throughout twenty or more States for 30 per cent. of a subscription made fifteen years before the decree, and to which the mass of these stockholders had reason to believe that all obligations, if any, had been extinguished years ago.

There is an apparently imposing equity in the application of these petitioners. But this apparent equity depends upon the reasonable suggestion in view of all this record of practical injury. There are equities on the other side. The creditors of this company, whoever they may be or how ever large their debts, have equities very superior to those of her stockholders. The suggestion that, as to any of the debts, the Statute of Limitations could be pleaded, or ought to be pleaded, is without any merit. The stockholders were permitted by the company to retain the greater part of their subscriptions, but they retained it subject to call when needed to pay creditors of the company. As part of the property of the company, these unpaid subscriptions were conveyed to the original trustees for the benefit of creditors, and the substituted trustee represents the beneficiaries of that dedication, or, in other words, all of the creditors of the company. The conveyance of the company made these subscriptions a trust fund, and as to no creditor can the Statute of Limitations be pleaded in favor of this trust fund. Upon this familiar principle I hardly think it necessary to cite authorities and content myself with referring to two Virginia cases—*Smith* v. *R. R. Co.*, 33 Grat. 617; *Bowie* v. *Poor School*, 75 Va. 300.

Outside of this suggestion of the Statute of Limitations, neither in the petition nor the argument has there been any suggestion of doubt as to the validity of the claims against the company reported by the commissioner and confirmed by the court in its decree, except as to a single debt.

This is a very large claim, however, and if any of the stockholders desire to have the decree reopened for new enquiry as to its validity, and can in a subsequent petition show sufficient reasons to justify apprehension that injustice has been done in recognizing this debt, the decree now to be entered will reserve the right to make the new enquiry upon proper terms. I must say, however, that from my examination of this record in view of the objections to the debt assigned by counsel in argument, I believe the new enquiry will result in re-establishing the claim, and prove of no practical benefit to the stockholders.

It was further urged in support of the petition that the original

trustees had not been required to account, and have not accounted. This objection appears to have arisen from a partial examination of the record.

At the last term of this court the surviving trustees were required to account before one of the commissioners of the court, and Commissioner Leake's report under that order was presented and confirmed, showing an indebtedness of the trust to both of the surviving trustees.

If, however, any probable injustice was done to the stockholders in this settlement of the trustees' account while the corporation was practically without representation, opportunity will be afforded to reopen the accounts. But in reopening these accounts either to surcharge and falsify the trustees' accounts or to assail the validity of any debt which has been recognized by the court, it is only fair that the stockholders at whose instance it is done should give security to pay any costs unnecessarily sustained by the trustees or creditors in making such further enquiry.

The amount of the indebtedness of the company recognized in the decree of December, 1880, is very large, but quite one-half of it is now the cumulation of interest upon debts which have been unpaid since 1866–67. The principal of the indebtedness recognized by the court, when compared with the estimated indebtedness of the company by the stockholders and directors in their last official action, is very suggestive that the stockholders have suffered no wrong in the accounts taken in the cause.

From any presentation in the petition, or in the argument of counsel in support of it, I cannot now see that there has been any probable injustice done to the stockholders in the ascertainment of the debts due by the company, but if there has been any, the court will be held open for enquiry upon any proper showing of the necessity for such enquiry at any time before the debts are paid.

Leave to file further petitions contesting any of these debts and to assert any liability of the trustees will, therefore, be reserved in the decree for these petitioners or other stockholders conditioned upon the assignment of adequate reasons and tender of security to abide the judgment of the court.

But no petition will be entertained to arrest or delay the enforcement of the decree of December, 1880, so far as it requires the substituted trustee to collect by suit or otherwise the assessment upon the stockholders of 30 per cent. of their subscription of stock. If that portion of the decree could be suspended or arrested, I believe that the ultimate result would be of necessity to impose upon the now solvent stockholders the payment of an increased assessment to meet the unnecessary costs of protracted litigation and the cumulation of interest upon indisputable debts of the company. The principal of these debts was estimated at the meeting of the

stockholders held in this city on the 10th of October, 1866, to be, as of the 1st November, 1866, some $350,000. The decree recognizes a principal of less than $300,000. The monthly interest upon say only $250,000, is some $1,250, and has to be paid sooner or later by these solvent stockholders. In their interest, therefore, not less than in the interest of the creditors, I am of opinion that the decree for the collection of the assessment should be promptly and vigorously enforced.

Petition of John Glenn, trustee, filed March 25th, 1885.

Glenn's adm'r and others
v.
National Express and Transportation Company and others.

In the Circuit Court of Henrico county:

To Hon. B. R. Wellford, Jr., judge of said court:

The petition of John Glenn, trustee, respectfully states that all of the copies of the record heretofore printed, and which embraced all of the original and direct proceedings down to and including the decree of January 3d, 1881, have been exhausted; and it has become necessary, in the prosecution of suits under the decree of December 14th, 1880, that additional copies should be printed. Since the said 3d day of January, 1881, however, certain voluminous collateral and immaterial proceedings have been had in the case at the instance of various stockholders and others, which, with the exhibits filed, have increased the record to an enormous bulk, without in any manner affecting the said original and direct proceedings.

If these subsequent collateral matters are to be considered a part of the record, the copying and printing of the same would greatly enlarge the bulk and multiply the costs in the premises; and in any of the numerous suits which your petitioner has brought or may bring against stockholders in the different States, an appeal on either side would necessitate the incurrance of useless costs to a degree amounting to oppression, inasmuch as the said extraneous matter would be wholly immaterial and unnecessary for the prosecution or the defence of such suits. The costs of said litigation in the different States are already very great, and are continually increasing. It is the obvious interest of the stockholders themselves, by whom these costs will ultimately be paid, that the same should be diminished as far as practicable.

The said collateral proceedings embrace the petition of J. J. A. Trotter, a stockholder, tendered to be filed on the 13th of October, 1881; the petition of John E. Hurst and others, filed on the 14th

day of May, 1883; and the petition of Thomas L. Farish and others, filed on the —— day of July, 1883; and the joint and several answers of the Baltimore and Ohio Railroad Company, the Bank of Commerce, W. W. Glenn's adm'r, and others, to the said several petitions (the said several answers having been filed on behalf of said respondents and all other creditors of the defendant company). Also numerous and voluminous exhibits and depositions, filed with the said petitions and with said answers as parts thereof. All of the said collateral proceedings resulted in the decree of July 21st, 1883, authorizing your petitioner, the trustee, within six months from the date thereof, upon the payment to him by any of the subscribers or persons liable on the stock of this company, of twenty-five per cent. of the original amount of subscription with certain interest and costs, to give an acquittance in discharge of such liability—which decree may be found, as entered, on the said 21st day of July, 1883, in the records of this case.

Your petitioner has duly reported to the court from time to time his action under the said decree, as will appear from the files of said record. The said reports are also voluminous, and immaterial in any proceedings against other stockholders.

Your petitioner further shows that on the 11th day of April, 1884, another petition was filed by Thomas J. Jennings, Goode Bryan and Charles B. Purcell, of a character similar to those above mentioned; to which the Baltimore and Ohio Railroad Company, the Bank of Commerce, Glenn's administrator and other creditors, filed a demurrer and a joint and several answer, and exhibits and the depositions of witnesses.

The object of each and all the petitions above named was to obtain a rehearing of the said decree of the 14th day of December, 1880, and to set the same aside.

The record of the court in this case shows that on the 9th day of December, 1884, the said several petitions of Trotter and of Hurst and others, and of Farish and others, were dismissed, and your petitioner was directed to proceed to execute the said decree of December 14th, 1880, as if the said order of July 21st, 1883, had never been entered; and that the matter of the said petition of said Jennings, Bryan and Purcell, having been fully argued and heard, the said petition was, on the 4th day of March, 1885, dismissed with costs.

In addition to the foregoing matters which are collateral and immaterial as aforesaid, various reports have been filed by your petitioner, of his transactions as trustee, and various reports have also been filed by commissioners of this court, auditing said reports, and in reference to the details of the administration of the said trust—which reports are wholly immaterial for the purposes of prosecuting or defending any suit or suits against stockholders, authorized by the said decree of December 14, 1880.

Your petitioner is advised that, for the said purposes, the only additions to the record heretofore printed, which closed with the decree of January 3d, 1881, are copies of the orders and decrees since entered; as they will show all of the subsequent action of the Chancery Court of the city of Richmond, ending with the order of that court, of the 27th day of June, 1884, removing this cause to this court, and all of the subsequent action of this court in this cause to this date.

Your petitioner therefore prays that your Honor will enter an order directing the clerk of this court in making out a copy of so much of the record in this case as may be required by your petitioner for showing his authority to sue the stockholders of the defendant company for the assessment of thirty per cent. of their stock as prescribed by the said decree of December 14, 1880, to omit the matters and things specified in the foregoing petition as immaterial and unnecessary in any litigation in respect to the said assessment.

If it should be deemed advisable to insert any of said petitions of stockholders and the answer and the exhibits and evidence filed, the matter of said last petition, known as the Georgia petition, would seem to be sufficient as being the last and as indicating the character of all, and furnishing the occasion for the only adjudication upon the matter of a rehearing, namely, the late opinion and decree of this court reviewing the original and direct proceedings of the Chancery Court of the city of Richmond, resulting in said decrees of the 14th of December, 1880, and 3d January, 1881, which constitute the authority of your petitioner to collect the said assessment.

In addition to the said petitions, proceedings thereon and reports aforesaid, petitions have been filed by several creditors and others having reference to interests in the fund under the control of the court upon which proceedings also have been had; all of which are entirely extraneous and immaterial as aforesaid, and it is prayed that these also may be omitted as aforesaid.

JOHN GLENN, Trustee,
By counsel.

CARRINGTON & FITZHUGH,
JOHN HOWARD, } p. q.

And at another day, to-wit:

At a Circuit Court of the county of Henrico, continued by adjournment and held for said county, March 25, 1885.

Glenn's adm'r and others
v.
National Express and Transportation Company and others.

This cause came on this day again to be heard on the papers formerly read and the petition of John Glenn, trustee, this day filed, and was argued by counsel; on consideration whereof, the court being of opinion that the prayer of said petition is reasonable and proper and should be granted, doth adjudge, order, and decree that the clerk of this court, in making out a copy of so much of the record in this cause as may be required by John Glenn, trustee, for showing his authority to sue the stockholders of the defendant company, for the assessment of thirty per cent. of their stock as prescribed by the decree of December 14th, 1880, heretofore entered in this cause, may omit therefrom the petition of J. J. A. Trotter; the petition of John E. Hurst and others, and the petition of Thos. L. Farish and others, the answers thereto and exhibits and depositions with said petitions and answers respectively filed; also the reports of John Glenn, trustee, of his action under the decree of July 21st, 1883; also the petition of Jennings, Bryan and Purcell, the demurrer and answer thereto and exhibits therewith, and the depositions of witnesses referring to that petition; also the various reports of said John Glenn, of his transactions as trustee, and the various reports filed by master commissioner of this court, auditing the said reports, and in reference to the details of the administration of the said trust; and also the petitions of creditors and others in reference to interests in the fund under the control of the court, referred to in said petition of John Glenn, trustee, this day filed, and the proceedings had thereon; the court being of opinion, and so deciding, that the several matters and things above specified are immaterial and have no bearing upon the validity of the said decrees of the 14th day of December, 1880, and the 3d day of January, 1881, establishing the right and authority of the said John Glenn, trustee, to collect said assessment of thirty per cent. of the unpaid subscriptions to the capital stock of the defendant company, which decrees still remain in full force as when first entered.

And at another day, to-wit:*

At a Circuit Court of the county of Henrico, continued by adjournment and held for the said county, December 13th, 1884.

Glenn's Administrator's
vs.
National Express and Transportation Company and others. } In Chancery.

*This decree was inadvertently omitted at its proper place, namely, at p. 210, after the decree of Dec. 9, 1884.

VIRGINIA:

In the Circuit Court of the county of Henrico, December 13th, 1884:

This cause came on this day to be again heard on the papers formerly read and on the report of Commissioner Wm. J. Leake, dated on the 5th day of November, 1884, and filed in the office of this court on November 26th, 1884, which report was made pursuant to decrees of the Chancery Court of the city of Richmond [of which court said Leake is one of the commissioners], rendered on January 22d, 1884, February 9th, 1884, and March 8th 1884, and to which reports no exception had been taken, and on the various accounts marked from No. 1 to No. 8 inclusive, and "Old Trustees' Account," and the various depositions and exhibits returned therewith, and on the reports of John Glenn, trustee, showing a settlement of his accounts from 13th August, 1883, to Jan'y 21st, 1884, and from that date to Octo. 8th, 1884, which accounts have been audited and approved by said Commissioner Leake, pursuant to the decree of Dec. 14th, 1880, and was argued by counsel: *On consideration whereof*, the court doth approve and confirm the said report of Commissioner W. J. Leake of date Nov'r 5th, 1884, and all of the said accounts returned therewith, except so far as may be hereinafter expressly otherwise provided. And the court being of opinion that the fund now under its control, and which has arisen from, and is the fruit of the compromise decree of July 21st, 1883, should be distributed equitably amongst all the creditors of the defendant company, according to the scheme therefor reported by Commissioner Leake, and being also of opinion that the creditors of the defendant company [other than John J. Kelly, as to whom special mention will be hereinafter made,] who are also stockholders therein, and who are still in default in payment of the assessment made by the court upon their shares, a list of whom is filed by Commissioner Leake as account No. 8, should not receive their dividends for the present, and in order to carry out the said equitable distribution of said fund, the court doth adjudge, order and decree that the following persons, or Charles Marshall and John Howard, their counsel of record, have leave to check on the Planters' National Bank of Richmond, on an extract from this decree, for the following sums, on account of their debts, against the National Express & Transportation Company, as reported by Commissioner Leake, that is to say:

First, Debts due officers and employees:

[See account No. 2 with Commissioner Leake's report.]

No.			
	1	Gardner T. Getty for the sum of	$34 98
	2	Arthur Shaff, for	70 84
	3	L. R. Smoot, for	309 01
	4	J. T. M. Barnes, for	137 32
	5	Gen. Joseph E. Johnson (to be checked for by Robt. Stiles, his attorney of record), for	975 29
	6	Richard T. Allison, for	70 01
	7	S. D. Childs, for	29 37
	8	John Biddle, for	19 58
	9	Oscar T. Keeler, for	486 67
	10	M. W. Hutcheson, for	137 10
	11	Charles W. Field, for	143 37
	12	F. E. Marks, for	83 98
	13	R. A. Jeffrey, for	10 96
	14	Floyd McCulloch, for	22 84
	15	S. Downey, for	36 77
	16	S. F. Leps, for	15 86
	17	James DuP. Fenton, for	39 17
	18	S. E. Poor, for	31 33
	19	J. W. Houck, for	15 27
	20	John G. Justice, for	50 92
	21	Thomas K. Davis, for	36 40
	22	D. S. Ryan, for	23 89
	23	C. D. B. Webster, for	32 51
	24	W. H. Glenn, for	29 37
	25	E. Winchester, for	27 16
	26	J. J. Graham, for	31 33
	27	J. L. Hawk, for	18 73
	28	R. C. Kinkead, for	43 39
	29	Sherman Bailey, for	13 70
	30	Earhart Bumans, for	15 66
	31	John Murphy, for	7 96
	32	F. W. Winchester, for	9 79
	33	William Grimes, for	15 66
	34	E. Shaffer, for	19 58
	35	G. H. Swift, for	5 87
	36	H. M. Cottingham, for	229 42
	37	J. H. McDade, for	39 17
	38	F. A. B. Jennings, for	22 19
	39	R. W. Atwell, for	29 37
	40	P. S. Johnson, for	42 43
	41	R. M. Demere, for	37 21
	42	H. C. Grubb, for	51 57
	43	F. Shackelford, for	21 80
	44	A. H. Contes, for	11 75
	45	J. H. Nichols, for	35 49
	46	C. M. Davis, for	2 62

47	W. M. Keblinger, for	37 41
48	W. J. Keblinger, for	39 17
49	J. L. Brode, for	52 55
50	Edwin W. Wade, for	14 75
51	L. H. Fitch, for	14 47
53	D. T. Richards, for	19 58
54	W. S. Walker, for	29 37
55	R. Hendricks, for	97 93
56	M. G. Farrh, for	50 53
57	A. Cudworth, for	29 87
58	S. Wiltbank, for	233 43
59	C. J. Wiltbank, for	111 84
60	Wm. Wyman, for	52 98
61	F. Dougherty, for	49 84
62	Thomas P. Bacon, for	94 35
63	Wm. C. Ford, for	35 29
64	A. T. Lavalette, for	5 48
65	C. C. Thompson, for	23 50
66	David Buest, for	23 50
67	H. D. Basler, for	8 44
68	Benjamin Flood, for	6 88
69	Edward Beans, for	15 01
70	H. Montgomery, for	4 70
71	B. W. Oakman, for	10 00
72	John H. Maxwell, for	3 72
73	James Millman, for	4 12
74	Fred Nagle, for	7 95
75	H. B. & A. Taylor, for	39 17
76	A. A. Laws, for	13 70
77	F. A. Goddard, for	10 94
78	Louis Green, for	31 33
79	Hollingsworth Warfield, for	2,025 82
80	L. Green, for	43 95
81	Rudolph Oehl, for	34 60
82	Daniel Seaton, for	45 04
83	John Wakins, for	8 22
85	W. H. C. Bayly, for	24 48
86	Stephen Cremin, for	12 53
87	George Bishop, for	11 75
89	F. B. Berkeley, for	44 65
90	Milton Ball, for	45 04
91	Henry Vaughan, for	10 00
92	George Bond, for	22 34
93	Andrew O'Meara, for	17 85
94	James Hood, for	9 62
95	W. H. Tibals, for	13 58
96	Edward McGeehan, for	22 65

97	F. Grill, for	7 54
98	Jacob Arnold, for	5 07
99	John Manly, for	9 23
100	Thomas McCullough, for	9 79
101	Thomas Burns, for	9 79
102	A. Boyce, for	10 96
103	F. Craig, for	4 22
104	J. Schleiffer, for	3 11
105	W. F. Anderson, for	6 85
106	George McAllister, for	7 24
107	S. Bishop, for	4 30
108	Martin Clark, for	36 32
109	George Clark, for	24 67
110	J. A. Pierce, for	60 93
111	W. H. Glancote, for	14 20
112	James T. Ball, for	5 87
113	G. C. Taliaferro, for	29 37
114	C. M. Davis, for	28 03
115	C. Yeungling, for	123 37
116	Thos. Dobbins, for	29 37
117	W. H. Gordon, for	4 89
118	R. A. Crawley, for	64 63
119	Edward L. Clark, for	22 02
120	A. N. Stewart, for	47 20
121	Benj. P. Grymes, for	23 50
122	W. L. Keller, for	55 61
123	Geo. M. Walters, for	37 21
124	A. J. Smith, for	47 00
126	Thomas Cook, for	84 02
127	J. L. Brodie (this to be checked for), by Pegram & Stringfellow, his attys, for	53 38
128	George A. Smith (this to be checked for), by Christian & Christian, his attys, for	239 83
129	M. B. Porteaux, for	115 22
130	J. P. McCorkle, for	99 01
131	Philip Stockton, for	178 98
132	A. B. Johnston, for	162 82
133	John J. Kelly, by Robt. Stiles, his counsel, for	940 54
	Making in the aggregate the sum of	$9,744 69

To be checked for by the creditors mentioned in said account No. 1, the dividends of E. W. Anderson, (No. 52, amounting to $19.58), M. C. Y. Barry (No. 84, amounting to $54.54), G. A. Schwartzman (No. 88, amounting to $17;18), and H. Heth (No. 125, amounting to $146.37), being retained under the control of the court until they shall have paid their assessments on their

stock, or shown cause against such payment, making a total of $237.67 thus retained.

And in like manner the following parties shall have leave to check on said Planters National Bank of Richmond for the dividends allowed them on their debts, as set out in the "supplement to account No. 2," as returned by Commissioner Leake, to-wit:

134	C. Raborg, or Charles Marshall, and John Howard, his counsel, for the sum of	110 54
135	B. F. Corr, or the same counsel, for	9 35
136	E. P. Reeve, assignee, or the same counsel, for	45 80
137	Isaac E. H. DeGroff & Co., or the same counsel, for	331 42
138	W. H. Gover, or the same counsel, for	50 88
139	J. R. Braitwaite, or the same counsel, for	229 48
	Making an aggregate of	$777 47

To be checked for by the creditors named in said "supplement to account No. 2."

And the court doth further adjudge, order and decree that the following corporations, through their proper officers, or Charles Marshall and John Howard, their counsel of record, do check on said Planters National Bank of Richmond for the following sums, as the dividends due them on their debts against the defendant company, according to account No. 3, with Commissioner Leake's said report, to-wit:

1	The Baltimore and Ohio Railroad Co., for	16,451 03
2	Bank of Commerce, Baltimore, for	6,600 67
	Making an aggregate of	$23,051 70

To be checked for under said account No. 3, with said report.

And the court doth further adjudge, order and decree that the following corporations, or Charles Marshall and John Howard, their counsel of record, do in like manner check on said bank for the following sums as the dividends due them on their debts against the defendant company, according to account No. 4, with Commissioner Leake's report, to-wit:

1	Philadelphia, Wilmington and Baltimore Railroad Co., for	1,346 08
2	Wilmington and Weldon Railroad Co., for	109 34

3	Northeastern Railroad Co., for	324 42
4	Charlotte, Columbia and Augusta Railroad Co., for	85 33
5	Richmond and Danville Railroad Co., for	226 60
	Making an aggregate of	$2,091 77

To be checked for under said account No. 4, with said report.

And the court being of opinion that the debts mentioned in account No. 1, returned with the said report, should be paid in full, all of said debts being for unpaid expenses of executing this trust, the court doth adjudge, order and decree that the following parties have leave to check on the Planters National Bank, of Richmond, for the following sums, in full of the debts reported as due them in said account No. 1, with Commissioner Leake's report, viz:

1	Page & Maury, for the sum of	$828 00
2 and 3	John J. Kelly (Robert Stiles, his counsel), for	515 24
4	John Blair Hoge, for	1,883 14
5	Burtin N. Harrison, for	250 00

Making an aggregate sum of $3,476 38–100 to be checked for by said creditor named in said account No. 1, with said report.

And the court doth further adjudge, order and decree that the following persons and corporations, or Charles Marshall and John Howard, their counsel, (except in cases where other counsel are expressly named, in which case then such counsel so named) shall have leave to check on said Planters National Bank, of Richmond, on an extract from this decree for the following sums, in payment of the dividends reported due to them by account No. 5. returned with Commissioner Leake's said report, viz:

No.	1	John M. Glenn, adm'r *d. b. n.* of W. W. Glenn, for	$7,458 90
	2	Francis Murray, for use of John R. Terry, for	2,715 25
	3	Henry M. Bash, trustee, for the sum of	16,359 11
	4	Luke H. Miller, for	465 58
	5	Fulton & Walke, for	103 09
	6	Robert Higgins, for	182 21
	7	Geo. McMaster, for	144 13
	8	Pennsylvania Co. for insurance on lives and granting annuities trustee under the will of Sarah V. Syckel, for	249 66
	9	Philadelphia, Wilmington & Baltimore R. R. Company, for	697 74

10	Louis Stix & Co., for	97 99
11	Wilmington & Weldon R. R. Co., for	86 09
12	Richmond, Fredericksburg & P. R. R. Co., for	1,051 65
14	Potomac Ferry Co., for	57 14
15	South Carolina R. R. Co., for	827 73
16	Charlotte, Columbia & Augusta R. R. Co., for	131 15
17	Baltimore Steam Packet Co., for	68 15
18	Orange & Alexandria R. R. Co., for	615 53
19	Franklin Harrison, for	28 16
20	Andrew J. Joyce & Co., for	21 97
21	"National Intelligencer," for	23 92
22	E. R. Cunningham, for	2 47
23	H. P. Gilbert & Co., for	2 33
24	"Publisher of Chronicle," for	50 07
26	J. W. Naini & Bro., for	12 56
27	Thos. Ware and Thos. Kelly, for	6 41
28	Palmer & Sly, for	8 25
29	Jas. S. Tapham, for	5 69
30	R. P. Buford, for	3 93
31	T. Titcomb, for	1 41
32	Henry St. Paul & Co., for	4 85
33	James Couning, for	9 97
34	Edward Shloss, for	44 26
35	Petty & Sawyer, for	123 24
36	"Mobile Daily Tribune," for	6 02
37	"Advertiser & Register," for	36 12
38	Young & Words, for	385 36
39	Sims & Hamilton, for	6 41
40	C. M. McMullan, for	1 08
41	Berger & Hoffman, for	1 68
42	Sperdth & Indeinden, for	2 81
43	J. C. Orr & Co., for	1 17
44	Walters & Knift, for	2 33
45	J. H. Logan & Co., for	0 19
46	Bushfield, Wallace & Co., for	0 21
47	Hamilton & Nagle, for	0 38
48	"Wheeling Intelligencer," for	8 09
49	"Wheeling Register," for	6 79
51	Atlantic and N. C. R. R. Co., for	101 28
53	C. W. Starbuck & Co., for	5 82
54	Fitch & Bro., for	3 30
55	D. McFarland, for	1 94
56	J. W. Newman, for	1 16
57	E. Raine, for	0 38
58	Brown & Davis, for	3 72
59	Sam'l Blair & Co., for	5 16
60	F. E. Suire & Co., for	2 68

61	C. B. Prather & Co., for	2 08
62	Maguire & Co., for	1 20
63	Andersen & McFarland, for	2 29
64	Wm. Huddart & Co., for	0 58
65	J. B. Shroder, for	0 72
66	H. G. Strobel, for	0 96
67	Western Union Telegraph Co., for	28 91
68	John M. Owen, for	1 64
69	Smith, Hawley & Co., for	6 74
70	J. Black, for	3 21
71	Capatnus Shaffer, for	1 20
72	R. B. Smith, for	7 63
73	Peter Hoffman, for	1 70
75	P. Doherty, for	3 86
76	John Taylor, for	1 88
77	John Dean, for	4 33
78	Hunter & Gammell, for	67 22
79	J. T. Jenkins & Co., for	3 20
80	C. W. & W. R. J. Long & Billups, for	11 45
81	J. J. Ford, for	10 02
82	Ogletree & Grubbs, for	10 16
83	S. S. Herman Livingston, for	12 97
84	J. A. Witherspoon, for	12 91
85	Town of Athens, Ga., for	4 24
86	Mrs. C. A. Johnson, for	60 69
87	E. R. Hodgson & Bro., for	4 43
88	Nicholson, Moss & Hutchinson, for	14 45
89	James Bond, for	26 01
90	Stockton & Co., for	18 66
91	F. Arnold & Co., for	25 19
92	G. A. Mercer, for	4 80
93	Rozwell King, for	19 29
94	Alabama & Florida R. R. Co., for	41 40
95	Mobile & Great Northern R. R. Co., for	30 02
96	Selma & Meridian R. R. Co., for	33 70
97	J. J. Terrell, for	56 06
98	J. B. Rhea, for	7 88
99	Margaret W. Day, for	52 98
100	Richmond & Danville R. R. Co., for	446 01
101	Va. Central R. R. Co., for	379 29
102	Richmond & Petersburg R. R. Co., for	67 69
103	Petersburg R. R. Co., for	78 39
104	Richmond "Dispatch," for	32 57
105	Richmond "Times," for	14 45
106	Richmond "Enquirer," for	23 33
107	Va. Free Press (Gallagher & Co.), for	3 86
108	Winchester "Times," for	2 30

109	Winchester "News," for	1 93
110	The Commonwealth of Virginia, for	99 56
111	City of Richmond, for	192 68
112	Warwick & Barkesdale, for	10 50
113	H. K. Douglas, for	1 93
114	J. B. Taylor, for	0 94
115	Merrin & Simpkins, for	1 93
116	L. A. Elliott, for	18 21
117	Benton H. Martin, for	22 50
118	N. W. Belcher & Co., for	38 54
119	Stephen Lane, for	49 14
120	H. Danford, for	1 73
121	Abernathy & Co., for	17 80
122	E. & H. Anthony & Co., for	68 48
123	Thomas Chalmers, for	23 60
124	A. M. Hays & Co., for	6 74
125	T. Franks & Co., for	23 79
126	Gordon & Slater, for	1 88
127	Richardson & Co., for	4 39
128	Joseph Schneider, for	9 61
129	R. Ibbotson, Pres., &c., for	36 83
130	D. Appleton & Co., for	11 12
131	I. H. Foote, for	19 26
132	E. J. Houseman, for	2 72
133	S. D. Easterly, for	17 98
134	W. S. De Saussure, for	57 80
135	Hiram Harris, for	75 84
136	Cameron, Barclay & Co., for	7 25
137	Canstein & Jacobs, for	3 39
138	Geo. D. Ladd & Co., for	15 45
139	Sawner & Ferguson, for	16 11
140	C. D. Frank, for	1 22
141	Wm. Brookbank, for	12 34
142	Evans & Cogswell, for	57 80
143	Benj. M. Innes, for	4 32
144	Oglesby & Hoge, for	14 78
145	James M. Cooper, for	9 48
146	McCandlass & Smith, for	2 75
147	Tucker & Sapman, for	124 80
148	Weinstein & Bro., for	4 63
149	McCall & Monteith, for	5 72
150	Fulton & Wilkes, for	11 77
151	Philip L. Justice, for	17 42
152	Andrew Johann & Co., for	0 96
153	C. L. Cadwallader, for	25 58
154	Warner & Co., for	7 72
155	E. Kalterhaus, for	5 35

156	James J. Martin, for	54 38
157	William Mann, for	7 91
158	R. McClure, for	9 62
159	James B. Smith & Co., for	31 92
160	Tryon, Bros. & Co., for	49 13
161	L. Bonaffon, for	53 78
162	Powers & Weightman, for	25 52
163	Boughman, Thomas & Co., for	2 36
164	Thomas B. Eaton & Co., for	0 56
165	Dickinson & Robelen, for	9 66
166	W. A. Wisdom, for	48
167	Underwood & Connor, for	2 94
168	J. P. Smith, for	3 51
169	Wm. McCauley, for	4 81
170	Williamson & Co., for	34 71
171	C. H. & M. House, for	17 33
172	Baltimore Gas-Light Co., for	22 23
173	Herman Bom, for	6 22
174	Adam Kahler, for	17 71
175	Gibson & Kirk, for	7 12
176	Baltimore Sun, for	5 50
177	Henry Roth, for	4 56
178	Bibb & Co., for	38
179	Fred'k Oelmann, for	2 85
181	Burton & Irving, for	6 00
182	Andrews & Thompson, for	3 43
183	George Brown, for	7 88
185	Hodges Brothers, for	7 12
186	Cushings & Bayly, for	6 10
187	Schwardtman & Co., for	5 70
188	S. S. Mann, for	22 42
189	H. Frank & Co., for	4 65
190	Mrs. S. C. Pickett, for	3 90
191	C. E. Needles, for	1 58
192	E. Whitman & Sons, for	1 90
193	J. H. Walze, for	7 60
194	McDowell, Robinson & Co., for	30 40
195	John T. Watkins, for	2 66
196	Hied & Mitchell, for	3 42
197	R. Sinclair & Co., for	6 55
198	Boerman & Lutlebaum, for	7 60
199	Weiglein & Heilner, for	2 28
200	Walter S. Moore & Co., for	5 22
201	J. W. Ebert & Co., for	1 33
202	Thos. D. Johnson, for	245 54
203	Bolton Bros., for	3 40
204	David Anderson, for	13 09

205	Wm. H. Oler, for	3 70
207	Evening Transcript, for	22 33
208	Montgomery, Slade & Co., for	1 14
209	Edward Sinn, for	67
210	P. P. Pendleton, for	20 53
211	D. Claude, for	4 81
212	Hild, Wammell and Mitchell, for	85
213	R. H. Tall, for	74
214	John Nugent, for	14 60
215	A. S. Abell & Co., for	4 18
216	Ammidon, Cranbie & Co., for	3 13
217	Page & Maury (or L. R. Page, their counsel), for	125 87
218	W. D. Miller, for	218 43
	Making an aggregate of	$36,242 35

To be checked for by the creditors mentioned in account No. 5, returned with Com'r Leake's said report.

And the court doth retain the dividends of the following creditors mentioned in said report in account No. 5, who are alleged to be stockholders in default in payment of their assessments until the further order of the court, to-wit: John Farrell (No. 25), $3.78; J. Reynolds (No. 50), amounting to $8.74; J. Taylor (No. 74), amounting to $1.88; Canfield Bro's & Co. (No. 180), $72.00; Geo. W. Webb & Co. (No. 184), $4.81, and John B. Baldwin (No. 218). $354.45—and it being alleged that Wm. J. Hawkin's claims to be the assignee of the claims of the Seaboard and Roanoke R. R. Co. (No. 13) on which the dividend would be $116.52, and of the Raleigh and Gaston R. R. Co. (No. 52), on which the dividend would be $230.32, making for the two $346.84; and it being alleged that said Hawkins is a delinquent shareholder, owing an assessment on ——— shares; the said dividends are also retained on said debts until the further order of the court; and the court decides that the claim of Kelly & Piel (No. 206), should be disallowed, it appearing that the same has been paid and the dividened of $428.25 allowed thereon is retained for future distribution, making a total retained dividend, under account No. 5 aforesaid, of $1,220.75. And the court doth further adjudge, order, and decree that John J. Kelly, late trustee under the deed of Sept. 20th, 1866, in the proceedings mentioned, have leave to file his petition, setting forth his claims for compensation for his services and for repayment of expenses incurred by him in the discharge of his duties as such trustee and in rendering his final accounts, which petition is accordingly now filed and the court will hereafter consider the same, and it is ex-

pressly declared that nothing herein contained shall be construed as prejudicing his rights in regard thereto.

And the court doth further adjudge, order and decree that John Glenn, trustee, out of the moneys now in his hands as such, do deposit at once, in the Planters National Bank of Richmond, to the credit of this cause, the sum of $2,795.43, to meet, in part, the sums distributed under this decree.

And the court, not being prepared at this time to pass upon the question as to the claim of the Commonwealth of Virginia for priority of payment of its claim, mentioned in Commissioner Leake's report aforesaid, the court doth adjudge and decree that this cause be recommitted to Commissioner W. J. Leake (who is hereby appointed a special commissioner for the purpose), who is directed to ascertain and report to the court—

1st. Whether the Commonwealth of Virginia is entitled to any priority of claim for payment of its said debts over the other creditors of the defendant Company;

2d. Whether the petitioner, John J. Kelly, is entitled to any additional compensation for his services and expenses in executing the trusts of the deed of September 20, 1866, over and above such amount as has been allowed him under this decree.

All which the said Commissioner will report to the court with any matter specially stated, &c.

A Copy—Teste:

GEO. W. CARTER, Clerk.

INDEX.

Subpœnas to 1st December Rules 1871, ... 1
Bill, ... 3
Exhibit "W. W. G., No. 1," 10
" "W. W. G., No. 2," 11
Amended and Supplemental Bill, ... 14
Exhibit "R," with " " 18
Subpœnas to 1st September Rules, 1879, ... 32
Answer of M. B. Poitiaux, ... 34
Decree October 6th, 1879, ... 37
Answer of Jos. R. Anderson, ... 38
Order November 6th, 1879, ... 39
Petition of Balt. & Ohio R. R. Co., ... 40
Order of November 15th, 1879, ... 41
Petition of Bank of Commerce, ... 41
Order of November 15th, 1879, ... 42
Petition of Phil. Wil. & Balt. R. R. Co., . . 43
Report of Com'r Kean filed June 19th, 1879, . . 44

Depositions returned with Com'r's report:

Deposition M. B. Poitiaux, ... 80
" J. E. Brister, ... 82
" J. R. Anderson, ... 83
" J. T. Snowden, ... 84
" Edward Price, ... 86
" Clapham Murray, ... 87
" Enoch Pratt, ... 89
" John J. Kelly, ... 90
" L. R. Smoot, ... 94
Exhibit "Richmond Whig," with Depo'n of J. E. Brister, 96
" "M. B. P., No. 1," with Depo'n of M. B. Poitiaux, 101
" "M. B. P., No. 2," " " " 102
" "J. P. McC.," " " " 102
" "J. R. A.," with Depo'n of J. R. Anderson, 103
" B. & O. R. R. Co., with Depo'n of J. T. Snowden, 106–7
" B. C. B., with depo'n of Edward Price, . . 108
" P. W. & B. R. R. Co., with Depo'n of Enoch Pratt, 118

Exhibit W. C. V. M & G. S., No. 1., . . . 120
" Geo. McMasters, ... 121
" Louis Stix & Co., ... 124
" J. B. Baldwin, judgment, ... 126
" J. D. Imboden, " 127
" Page & Maury, " 127
" Ould & Carrington, " 128

Exhibits with Dep'n of Luther R. Smoot:

" No. 1, with Dep'n of Luther R. Smoot, . . 129
" No. 2, " " " " . 130
" No. 3, " " " " . . 131
" No. 4, " " " " . 133
" No. 5, " " " " . . 134
" No. 6, " " " " . 136
" No. 7, " " " " . . 138
" No. 8, " " " " . 139
" No. 9, " " " " . . 140
" No. 10, " " " " . 142
" No. 11 & 12, with Deposition of Luther R. Smoot, 150
" No. 13, " " " " " . 151
" No. 14, " " " " " . 154
" No. 15, " " " " " . 155
Decree of 10th July, 1880, ... 156
Decree of December 14th, 1880, ... 156
The answer of John B. Hoge and John J. Kelly, . 184
Answer of John Blair Hoge, ... 185
Amended and Supplemental Answer of J. J. Kelly, . 185
Amended and Supp'l Report of Com'r Kean, . . 185
Exhibit A, with " " " " " . . 187
" B, " " " " " " . . 188
" C, " " " " " " . . 188
" D, " " " " " " . . 189
Act of Incorporation and Amendment, . . 190
Opinion of Court, ... 194
Decree of January 3d, 1881, ... 200
Order of Oct. 13, 1881, ... 202
" " 14th May, 1883, ... 202
" " 21st June, 1883, ... 203

Decree of 21st July, 1883, ... 204
Order of 13th Dec., 1883, ... 205
" " 18th Dec., 1883, ... 205
" " 24th January, 1884, ... 206
" " 9th Feb'y, 1884, ... 206
" " 8th March, 1884, ... 207
" " 27th June, 1884, ... 209
" " July 1st, 1884, ... 209
Suggestion of death of Trotter, ... 209
Decree of December 14, 1884, ... 210
" " 9, " 210
Order of February 21, 1885, ... 210
Report of Com'r Leake filed February 25, 1885, . 211
Petition of Jennings and als, filed 11th April, 1884, . 214
Order of January 27, 1885, ... 216
Demurrur and answer of creditors to petition of Jennings and als., ... 217
Original and full report of Business Committee, . 232
Depositions filed February 19, 1885, of P. P. Winston, B. H. Berry and Lewis P. Winston, ... 234–8
Decree March 4, 1885, ... 239
Opinion of court, ... 240
Petition of John Glenn, trustee, ... 246
Decree of March 25, 1885, ... 248
" " December 13, 1884 249

W. W. Glenn's Administrator, and Others.

vs. { **In the Circuit Court of Henrico County.**

The National Express and Transportation Company. and Others.

STATE OF VIRGINIA,

COUNTY OF HENRICO, to-wit:

I, GEORGE W. CARTER, Clerk of the Circuit Court of the said County of Henrico, in the State of Virginia, do hereby certify that the foregoing is a full, true and entire transcript of the record of the above entitled suit of W. W. GLENN'S ADMINISTRATOR, AND OTHERS, *vs.* THE NATIONAL EXPRESS AND TRANSPORTATION COMPANY, AND OTHERS, now remaining in my said Court, prepared according to the order of the Court passed in the said cause, on the 25th day of March, 1885.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court at the Court House, this 25th day of June 1885, and in the 109th year of the Commonwealth.

Geo. W. Carter Clerk.

STATE OF VIRGINIA,

COUNTY OF HENRICO, to-wit:

I, BEVERLEY R. WELLFORD, JR., only Judge of the Circuit Court of the County of Henrico, in the State of Virginia, do certify, that GEORGE W. CARTER, whose genuine signature is subscribed to the foregoing certificate, was at the time of signing and attesting the same, the Clerk of the said Court, and that his said attestation is in due form.

Given under my hand and seal, this 25th day of June, 1885.

WILLIAM J. HAWKINS, *Plaintiff in Error*,

vs.

JOHN GLENN, TRUSTEE OF THE NATIONAL EXPRESS AND TRANSPORTATION COMPANY, *Defendant in Error*.

Supreme Court of the United States, October Term, 1888, No. 266.

On behalf of the plaintiff in error, we make the following

ASSIGNMENT OF ERRORS

in addition to that made by other counsel, viz.: —

That the court erred in instructing the jury at the close of the trial, that "if they believed the evidence, they must find for the plaintiff," [Pr. Rec. 15], for the following reasons: —

1. The evidence shows that the decree of the Richmond Chancery Court making the call and assessment, upon which alone this action is based, was void for want of jurisdiction as against plaintiff in error, because he was not a party to the suit in which such assessment was made.

2. The evidence shows that the cause of action was barred by the statute of limitations.

And in support of this assignment of errors, we submit the following

ARGUMENT.

I.

The assessment made by the Richmond Chancery Court was void for want of jurisdiction.

This was an action at law brought in the State of North Carolina by the assignee of the National Express and Transportation Company to recover an amount alleged to be due by the defendant under and by virtue of an assessment or-

dered by a court of equity in the State of Virginia against the stockholders of said company. Hence the right to recover in this action must depend primarily upon the validity of the assessment upon which the action is based. If that assessment be void, or of no binding force, as against the defendant, then the judgment rendered against him by the court below must be reversed, even though it appear the amount of his stock subscription may not have been fully paid.

The record in the present case discloses the character of the suit and proceedings in which this assessment was ordered. It will be observed, however, that the record contains the proceedings in three separate and distinct suits all instituted in the name of *Glenn;* and, as the proceedings of any one of these three suits are not confined to a particular part of the record, but are distributed here and there with proceedings in the others intervening, it is necessary, when referring to the record, to keep this fact in mind to avoid mistaking an entry relating to one suit for that of another.

These three suits are respectively: the one of *John Glenn, Trustee, etc.* v. *William J. Hawkins*, being the one in which the present writ of error is pending, and the proceedings relating to which will be found on pp. 1 to 15 and on page 71 of the printed record. Another, is the suit brought in April, 1870, in the Supreme Court of Baltimore by *W. W. Glenn* v. *The National Express and Transportation Company*, in which Glenn recovered his money judgment against the Company, and the proceedings relating to which are to be found on pp. 24, 31, 32, 34, and part of 36 of the record. The third is the suit before the Richmond Chancery Court, in which the assessment was made; and the proceedings relating to which occupy all of the record other than the pages above enumerated. But as to this last case it must be remembered that it was first brought in the name of *W. W. Glenn*, as plaintiff, and afterwards revived in the name of *John W. Wright, Sher-*

iff, etc., Administrator of W. W. Glenn, deceased, and that the proceedings relating to this suit are sometimes entitled *John W. Wright,* against the company, and at other times *Glenn's Administrator* against the company. Whether appearing under these heads or under that of *W. W. Glenn,* the proceedings all relate to the one case.

The record shows that the proceeding in the Richmond Chancery Court was instituted in December, 1871, by W. W. Glenn, who was a judgment creditor of the National Express and Transportation Company, and who sued in behalf of himself and other creditors who might elect to join him.

The bill filed at that time alleged in substance that the company in 1866 conveyed and assigned its property and effects to three trustees in trust for the benefit of its creditors; that this deed had been the subject of much doubt and criticism; that at the time of such assignment only twenty per cent. of the stock subscription had been assessed or called in, and that of this twenty per cent. a large portion remained uncollected; that the remaining eighty per cent. had never been called or assessed; that this eighty per cent., by reason of not having been called or assessed, had not passed to the trustees under the deed of assignment, and that even if an assessment were to be made upon it, the right of the trustees to collect it would be doubtful. It further alleged that the stockholders resided in various different States and jurisdictions, and that if the complainant should proceed against them in their respective jurisdictions it would increase litigation and lead to other injurious consequences; alleged who were the president and directors elected at the last election which had been held by the company, and the residence of each, and that under the charter of the company these persons continued to be the president and directors until successors should be elected and qualified.

In conclusion, it alleged that in view of these, and other embarrassments and difficulties mentioned in the bill, and

"*in view of the unquestionable right of said creditors in* "*some form to compel payment from said stockholders, the* "*said creditors are entitled to the interposition of a court* "*of equity for their relief.*" The extent of this interposition, to which the complainant considered himself entitled, is indicated by his prayer for relief, which was that the trustees might be required to state what they had done with respect to the assets they had received; that an account should be taken of the unpaid indebtedness of the company and of the value and amount of the stock subscriptions which had not been assessed; *that the board of directors should be decreed to make a call or levy an assessment in case they fail to do so voluntarily;* that the deed of trust and rights of the trustees thereunder be construed, and that in the meantime a receiver *ad litem* be appointed to take charge of the assets in the hands of the trustees, and to *collect any amounts that may come due from stockholders upon any new or additional calls which may be made by the company.* Upon this original bill subpœnas were sued out against the three trustees and against the president and directors. No subpœna was taken as against the company. The subpœnas issued against two directors, Anderson and Harman, were served. The others were not served; and nothing further was done in the suit until after the lapse of nearly eight years, when, in August, 1879, an amended and supplemental bill was filed by John W. Wright, sheriff, etc., as administrator of W. W. Glenn, deceased, in which it is alleged that since the original bill was filed nothing had been done by the trustees, or by the company, or by its officers toward satisfying claims of creditors; and after making some charges of dereliction and wrong against the trustees, and alleging many things to which the complainant was advised he was entitled, among which was that the court would remove the old trustees and either appoint a receiver or a new trustee, and that *if the company, after due requirement, should fail to levy an assessment on the stockholders*, the court would make the same, he prays that

the same relief prayed for in the original bill be granted, and for the removal of the trustees and the appointment of a receiver or another trustee, to whom the assets and property of the company should be conveyed. Upon this supplemental bill new subpœnas were sued out against the same persons as before, who were alleged to be the president and directors of the company (except as to the director, Harman, who had died in the meantime); also against two of the trustees, one of them having also died; and also a subpœna against the company, and against one Poiteaux, who was alleged to be the cashier and treasurer of the company (see pp. 27, 30–35). Of these subpœnas, service was had upon two of the directors, viz.: Anderson (who was served before) and Norvell, both of whom were residents of Virginia; service was also had upon Poiteaux, the alleged cashier or treasurer; and the subpœna against the company was returned as having been served by the delivery of copies thereof to the director, Anderson, and to the alleged cashier, Poiteaux (see pp. 36, 37, 38, 39). As to the two trustees, and the president, and five of the directors of the company an affidavit was filed that they were non-residents of the State of Virginia, upon which notice to them by publication was ordered, which was published in a Richmond newspaper. Subsequently judgment was taken *pro confesso* against all of the defendants except Anderson and Poiteaux, who filed answers; that of Anderson stating he had no recollection of ever having served as a director, and that of Poiteaux stating he had been for a short time before the assignment to the trustees was made, the cashier of a "division" of the company. In the same order by which judgment *pro confesso* against the non-appearing defendants was taken, the court ordered one of its commissioners to inquire into and report to the court an account of the debts due by the company and of its assets (p. 40); and this the commissioner proceeded to do. Some months afterwards the two surviving trustees, Kelly and Hoge, came in and filed answers; that of Kelly being

very voluminous (pp. 49–56), and bearing such a striking resemblance in ideas and phraseology to the amended and supplementary bills one is persuaded either that Kelly must have drawn the original and supplemental bills or that whoever did draw them must also have drawn this answer for Kelly. In June, 1880, the commissioner made report that the liabilities of the company exceeded $500,000, and that a call on the unpaid stock of twenty per cent would be necessary; and, in a supplemental report, he increased this amount to thirty per cent (pp. 57–58).

Thereafter on December 14th, 1880, the court rendered its decree in the cause (see pp. 45–48), accompanping the same with an opinion giving the reasons upon which its decree was based and making the same part of the record (see p. 64).

By this decree the court adjudged *that the deed of trust from the company to the trustees was a good and valid deed and operated to convey to and vest in the trustees all of the unpaid and uncalled for subscriptions to the capital stock, and the right to receive and collect the same according to the terms of the contract of subscription; that the trustees, Hoge and Kelly, should be removed from their trust and John Glenn "appointed trustee in the said deed in room and stead"* of said *Hoge and Kelly*, and that the latter should deliver to "the substituted trustee" all property of the company in their hands; that Glenn should execute a bond before acting as such "*substituted trustee;*" that the company should pay to the various parties found by the commissioner to be creditors of the company, the aggregate sum of $509,392.41; and as it appeared to the court that it was "necessary and proper that at least thirty per cent of said "subscriptions be now called for and required in order to "meet the debts of said company and the costs and ex-"penses of collecting and administering said fund; and it "further appearing to the court that the said company has "long since ceased and abandoned its business, and that "for about fourteen years there has been no meeting either

"of the stockholders or of its board of directors, *it is ad-*
"*judged, ordered, and decreed that a call and assessment be,*
"*and the same are hereby made upon the capital stock*
"*and stockholders of the said National Express and*
"*Transportation Company of thirty per centum of the par*
"*value of said stock, being thirty dollars on each and every*
"*share thereof, and that the stockholders of said company*
"*and each and every of them and their legal representatives*
"*and assigns be, and they are hereby, severally required to*
"*pay the several amounts hereby called for and assessed to*
"*the said John Glenn substituted trustee* * * * and
"the said trustee is hereby authorized and directed to collect
"and receive the said call and assessment, and to take such
"prompt steps to that end by suit or otherwise and in such
"jurisdictions as he may be advised," etc., etc. (see p. 48.)

The opinion of the court filed with this decree will be found on pp. 64-70. It refers to the statute of Virginia requiring that unpaid subscriptions to stock should be paid "*as required by the President and directors.*" The bill of exceptions in this case before the court also states that the requirement upon the stockholder in reference to the unpaid portion of his stock subscription was that he should pay "*as called for by the President and directors.*" And under a by-law of the company five directors were necessary to form a quorum for the transaction of business. (See Ex. B, p. 59.)

It thus appears from the record that in the suit in which the assessment in controversy was ordered the plaintiff in error was not a party to or notified of the suit; that only two out of the eight surviving directors of the company were actually served with notice; that the six other directors (including the President) were non-residents of the State of Virginia, and never appeared in, or had notice, other than by publication, of the suit; that of the two directors served, but one them, Anderson, appeared or answered; that the Company was served with process constructively

only, by leaving a copy of the subpœna issued against it with Anderson, the director who had been personally served, and with one Poiteaux, who had formerly acted as cashier of a "division" of the company; that no one appeared or answered for the company; and that as to it, as well as to the President and all but one of the directors, the bill was taken *pro confesso*. It further appears that under the laws of the State of Virginia where the company was incorporated, the balance remaining unpaid on stock subscriptions was payable as called for or required by the president and directors of the company. Also, that the court by its decree, adjudged the deed of assignment from the company valid and effectual to convey to the trustees named therein or their successors, all of the assets of the company, including amounts uncalled and unassessed on subscriptions to stock; and, said deed being thus declared valid, the court declined to have the trustees deliver the property so conveyed to them into the court, or to transfer and convey the same or any part thereof, to a receiver of the court, as was prayed for by the complainant, but, on the contrary, ordered the same to be transferred and delivered to a new trustee appointed as the successor and substitute under the deed of assignment of the original trustees who were by the court removed, and to be held and controlled by said substituted trustee under and by virtue of the terms of the said deed of assignment.

It further appears that the pretended assessment was not made at the instance or request of the original trustees or of the trustee substituted in their stead; nor did the complainant ask or claim either in the original or supplemental bill that the court should make or order an assessment unless the directors should fail to make the same after being duly required so to do by the court; and that the court, without any previous requirement upon the company or the directors (over whom it assumed to have jurisdiction) to make the same, and of its own motion, not only ordered and decreed an assessment "upon the stock and stock-

holders," but ordered and adjudged the stockholders (no one of whom so far as appears was before the court) to pay the amount so assessed to the substituted trustee.

Such was the assessment upon which the present action against the plaintiff in error was successfully maintained in the court below.

We shall not question the jurisdiction of the Richmond court to remove the original trustees or to substitute another trustee in their stead; nor its power, in order to determine whether the original trustees had been derelict in not collecting the assets and applying the same to the payment of the corporate debts, to ascertain the extent of the liabilities of the company, and the extent and value of the assets which the trustees might have made available in discharging these liabilities. Upon the assumption, which we shall not dispute, that the corporation was served with process in a manner recognized as sufficient under the statutes of Virginia, coupled with the fact that before the final decree was entered the trustees entered their appearance and were before the court, we concede the court had the power, at the instance of a judgment creditor, who was one of the beneficiaries of the trust, not only to give to the deed of assignment a judicial interpretation and construction, but also to remove the derelict trustees and appoint another trustee in their stead.

Nor is it necessary to the position for which we contend, to deny the power of the Richmond court to decree and order in that proceeding the payment by the company of the sums or demands found by the commissioner of th court to be liabilities of the company. We may concede that this portion of the decree was only reversible on the ground of error.

As to each of these matters the presence of the stockholder was in no sense necessary, and the fact he was not made a party to the suit in which they were adjudicated could not affect the validity of such adjudication. If, as to these matters, the corporation was properly notified,

the stockholder whose interest or concern in them was through and by virtue of his membership in the corporation, would be concluded by the judgment or decree against the corporation.

But in respect to that portion of the decree adjudging against the stockholders an assessment or liability on their stock and requiring the substituted trustee to sue for and collect the same, we insist the Richmond court had no power or jurisdiction whatever to make it without the presence of or notice to the stockholders; and that as to this matter the fact the company, against which no liability was or could be adjudged or decreed by virtue of an assessment, was lawfully served with process, or even had it been, by some legal representative, actively and continuously before the court, could give to such assessment or order no conclusive or binding force as against the stockholders of such company.

That our position may not be misunderstood, it may be well for us to say at the outset we recognize as firmly established that the balance remaining unpaid on stock subscriptions is a trust fund for the payment of corporate debts; and that, in a proper proceeding and with the proper parties before it, courts of equity will subject this fund to the discharge and satisfaction of such debts. But because such jurisdiction pertains to courts of equity in general, it does not follow that when the exercise of this jurisdiction is attempted by a particular court of equity, it is at liberty to disregard fundamental rules which control all judicial procedure. Certainly such court may not set itself in motion. Some one entitled must invoke its power, and some one in default upon whom the power should be exercised, must be within its reach. In the abstract the power may be conceded; but whether it exists in the particular case depends upon the pleadings and process of that particular case. If the averments of the bill are not such as invoke the power, or the parties before the court are not those upon whom the power can be exercised, then the exercise of the power is simply *coram non judice* and void.

We further recognize and concede that in a proceeding brought by a judgment creditor of an insolvent corporation against a stockholder of such corporation, a court of equity has full power and authority to subject to the payment of such creditor's demand the amount remaining unpaid on the stock held by such stockholder. And this power may be exercised even though by the terms of the subscription the balance unpaid is made payable as or when called for by some particular body or persons who have failed or refused to make such call. Moreover, it is admitted that (except in cases where under provisions of statute the creditor must pro-rate with other creditors, or the liability of the stockholder must be pro-rated with that of other stockholders) the fact the creditor instituting the suit fails to join with him other or all of the creditors of the company, or to join with the stockholder sued other or all of the stockholders of the company will not prevent a recovery from those who are sued.

Moreover, in cases of this kind, as well as in all others where the liability of the corporation is asserted against the stockholder, a judgment obtained against the corporation is conclusive evidence of such liability. In other words, the stockholder is estopped by such judgment to deny the existence of the liability thereby adjudged against the corporation unless such judgment can be impeached on the ground of fraud.

Authorities in support of these propositions may be found in great number. We shall have occasion to refer to a few of them, not because we question their soundness, but because under a misapprehension, as we submit, of their meaning or effect, they have been cited and relied upon by some of the courts which have adjudged others of these Glenn cases adversely to the stockholder, as furnishing precedent or support for the assessment now in controversy.

The grounds on which we challenge the validity of this

assessment do not conflict with any of these conceded propositions.

We claim the Richmond Chancery Court had no jurisdiction or power in the case before it to make an assessment which could bind or affect the plaintiff in error, because he was not a party to or notified of the proceeding, nor was any one before the court who could be lawfully considered his agent, representative or substitute in that behalf. And the grounds on which we base this claim, are: —

First. To authorize a court of equity, whether at the instance of creditors of the corporation or others, to make a valid assessment, the stockholders must be made parties to and have notice of the proceeding in which such assessment is made.

It is a fundamental rule of equity procedure that all persons materially interested, either legally or beneficially, in the subject-matter of the suit, however numerous they may be, are to be made parties to the suit, either as plaintiffs or defendants, or should at least have notice of it, in order to bind them by it.

1 Daniel's Ch. Practice, p. 190;
Story's Eq. Pleading, secs. 76–80;
Pomeroy's Equity Jur., sec. 114;
McVeigh *v.* U. S., 11 Wall. 259;
Ribon *v.* R. R. Co., 16 Wall. 446, 450;
Windsor *v.* McVeigh, 93 U. S. 274.

As to so much of this rule as requires all persons interested in the subject-matter of the suit to be made parties, an apparent rather than real exception has been made in proceedings in the nature of a creditor's bill instituted by a judgment creditor of an insolvent corporation to subject the liability of a stockholder to the payment of such judgment, where it is impracticable to join all the stockholders of such corporation in the one suit. The reason, however,

for admitting the exception (if indeed it be an exception) seems to be that the liability of the stockholder is a several and not joint liability; and each one may be required to pay the par value of the stock owned by him, regardless of the fact that others may or may not succeed in escaping payment for the stock owned by them. While therefore the stockholder who is required to pay may compel his co-stockholders to refund or contribute to him their prospective pro-rata or share of liability for the corporate debt he has paid, the debtor is not required to enforce or adjust such contribution. He is entitled, if he sees fit so to do, to enforce payment of his claim from each stockholder to the full extent of such stockholder's liability to the company.

Ogilvie *v.* Knox Ins. Co., 22 How., p. 280;
Pollard *v.* Bailey, 20 Wall., p. 520;
Godfrey *v.* Terry, 97 U. S. 171;
Hatch *v.* Dana, 101 U. S. 205 (211);
Lamar Ins. Co. *v.* Hildredth, 55 Iowa, 248;
Erickson *v.* Smith, 46 N. H. 371.

But it by no means follows that a judgment or decree rendered in such suit has any validity or binding force upon a stockholder who is not made a party. We know of no case, and assert with the confidence which comes from a very extensive research, that no case can be found where a decree rendered in such a proceeding has been held binding on stockholders other than those actually made parties to the suit. The only significance such cases can have is that the fact other stockholders are not sued in such suit constitutes no defense to those who are sued. So that such cases are in fact examples of, rather than exceptions to, the application of the rule, in that they nowhere attempt to bind any but those actually made parties to the suit. The rule remains that, to bind a party by any judgment or decree whereby his interest is to be affected, he must have

notice of, and be given opportunity to be heard before such judgment or decree is rendered. As said by Mr. Justice Field, in the opinion delivered by this court in *Gilpin* v. *Paige*, *18 Wall. 350:* "It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound "until he has had his day in court."

This being the established rule governing judicial proceedings, the question arises, upon what theory can it be maintained that a court of equity may decree an assessment against the stockholders of a corporation without such stockholders being parties to the proceeding in which the decree is entered? Certainly it cannot be on the theory that he has no interest in the subject-matter of the assessment; for, if the corporation is insolvent, as it must be when the aid of a court of equity is invoked by a creditor, the stockholder is in fact the only party who is really interested in the assessment. The question, how much of the stock subscription remains unpaid, or subject to assessment; how much should be assessed, either in respect to the payment of indebtedness, or of expenses incurred or to be incurred; whether the claims asserted either on judgment or otherwise against the corporation are *bona fide* or fraudulent; and, where not previously reduced to judgment against the corporation, whether for any reason they should be disallowed, are questions which directly and immediately affect the stockholder himself, and in which, after insolvency of the corporation has occurred, neither the corporation or its officers retain any substantial interest whatever. Particularly was this the case in respect to the National Express and Transportation Company; since, as is shown by the record, it had assigned and transferred all its interest or right in the unpaid stock subscriptions to the trustees mentioned in the trust deed.

And yet if stockholders be not necessary parties to judicial proceedings having for their object and purpose the determination of the amount or percentage to be assessed

against them, then these questions, immediately and solely affecting the stockholders as individuals, are finally and conclusively adjudged against them without any opportunity having been given them to be heard.

It is no answer to the manifest injustice of such result that the stockholders would not have been entitled to a hearing on these questions if the assessment had been ordered by the president and directors of the company. The reason they would not have been so entitled in that event, has no application to the case of an assessment made by the court. The president and directors were the parties who, by the express provision of the law under which the company was incorporated, and by the terms of the subscription contract, were designated and selected to determine these questions in behalf of all parties concerned. But there was no agreement on the part of the stockholders that the assessment could be made by any one other than the president and directors. Undoubtedly a court of equity could make it, if the president and directors refused, and the interest of creditors demanded it should be made. But in such case the court would not act by virtue of any agreement or contract with the stockholder. Its action would be under its jurisdiction or power as a court, not exercised with the consent or at the instance of the stockholder, but for and at the instance of a creditor asserting an adverse claim against the stockholder. Its hearing and determination of the matters involved would be that of a judicial tribunal created under the law, and not by agreement of parties, and must be governed by rules appliable to proceedings before such tribunals, of which no rule is more positive in its obligation than that parties to be affected by the court's action must have notice before such action is taken. *As well may it be claimed that the court could make the assessment of its own motion and wholly ex parte; since it was competent for the President and directors to assess at*

their own instance and without hearing or notifying anybody before taking action.

Nor can the right of the Richmond court to make the assessment without notice to the stockholder be maintained on the theory that the stockholder was notified by implication or vicariously, through service of process on the corporation.

As we have already said, a judgment or decree against a corporation is conclusive against the stockholder as to the validity or amount of the claim adjudged. (*Cook on Stockholders, sec. 222.*)

But the adjudication must certainly be *against* the corporation; or, in other words, must determine some right asserted by or against the corporation or adjudge some liability, or decree the performance of some duty, on the part of the corporation. The mere fact that a corporation happens to be joined with others as a party to a suit is not the test of whether the stockholder is bound by what may occur in such suit. As to matters decreed or adjudged against other parties joined with a corporation in an equity proceeding, and concerning which no right or obligation is asserted in favor of or against the corporation, the rule could have no application. If, as to the truth of such matters, any stockholder should subsequently attempt to raise an issue, it could hardly be contended he was precluded from so doing merely because the corporation of which he was a member, was a party to the suit wherein, as between or against others only, a liability or duty had been adjudicated. On the contrary, it would be open to such stockholder to show a state of facts totally at variance with those which could alone have made the procurement of such judgment possible.

As an illustration, suppose a creditor proceeding against stockholders in one jurisdiction should join the corporation as a party to such proceeding; and the court in that case should find and adjudge matters common to all other stockholders of the company as well as to those actually pro-

ceeded against; would it be held in another proceeding against other stockholders, whether in the same or a different jurisdiction, that because the company was a party in the first proceeding, whatever may have been found or adjudged by the court as against the stockholders in that proceeding concerning matters common to all the stockholders would be conclusive or binding against the stockholders subsequently proceeded against? There can be no doubt the stockholders last sued would have the same right to be heard on these matters as those who were first sued. And yet this could not be if the mere fact of the company being made a party to the first proceeding concluded and bound the stockholders generally to whatever might have been found or adjudged in such proceeding. None of the cases which hold the stockholder concluded, base the decision on the mere fact that the corporation was a party to the suit. They all arise on judgments which establish or determine a right, liability or duty on the part of the corporation. And the reason assigned for their decision is not that the corporation was a party (for it was necessarily so), but more especially because in the matter out of which the liability arose, the complainant dealt or was concerned with the corporation alone, and not with its members; and having procured his judgment in good faith against the corporation — the only party to the transaction, or against whom he could have asserted a liability — that judgment became the highest, and hence conclusive, evidence of the existence of such liability.

Henry *v.* Vermillion, 17 Ohio, 187 (191 and cases collated in note to Bisset *v.* Kentucky Co., 15 Fed. Rep. 361–2).

But where no duty is enjoined, or liability or right determined in favor of or against a corporation, the fact it is a party to the suit can give to the result no binding force or effect against a stockholder.

While, therefore, a judgment creditor who attempts to enforce payment of his judgment against the stockholder is not required to retry the merits of his claim against the company, yet, every step or proceeding taken by the creditor to compel the stockholder to pay this judgment, whether the proceeding be for an assessment against stockholders in general or for recovery of the entire stock liability of certain of the stockholders, is a step or proceeding directed solely against the stockholders; and, whether the corporation is or is not a party to such proceeding, does not in any manner affect the result. Presumably the remedy of the creditor against the corporation has been exhausted; and he now seeks to enforce another and independent remedy against the stockholder. And, unless some act on the part of the corporation itself is required as an incident to this remedy, the corporation can in no sense be considered a necessary or even a proper party to the proceeding for enforcing this remedy.

In the case before the Richmond court no act on the part of the corporation was necessary to be done, nor did the decree impose on the corporation any duty, in respect to the assessment. It had nothing whatever to do with the stock or stockholders and the court did not require it to have. The decree of that court determined, *first:* that the deed of assignment or trust made by the company in 1886 to the three trustees was a valid deed and conveyed to the trustees all the assets of every description belonging to the company, including the uncalled for and unpaid subscriptions to stock; *second:* that the original trustees should be removed from their trust and a new trustee be appointed; *third:* what the then existing indebtedness of the company amounted to, and to whom it belonged, and that the Express Company should pay the same; and *fourth:* that an assessment of thirty dollars per share be adjudged against the stockholders, and that they pay the same to the new or substituted trustee.

These matters were wholly independent of each other,

and each related to distinct grounds for the court's interposition. Under a proper bill, and with proper parties, either relief could have been given without the other.

As to the *first* and *second* of these matters it is not contended that the stockholder was either a proper or necessary party. The power of the court to decree the interpretation of any doubtful feature of the deed creating the trust, as well as the removal of the trustees for failure to discharge their duty and the substitution of other trustees or of another trustee in place of those removed, could be exercised if the corporation, the trustees and the beneficiaries of the trust, or creditors secured by the trust, were properly before the court. With this branch of the case, the stockholder was merged, so to speak, in the corporation. The contract sought to be interpreted, and its execution secured through the removal of incompetent and the appointment of efficient trustees, was a contract or deed not made by or with the stockholder, but by and with the corporation alone. This therefore was a matter with which the law would not recognize the stockholder as having any right or concern. Whatever interest he might have in the decree in this respect, was such only as he derived by and through his interest generally in the affairs of the corporation. Hence the court's interpretation of the deed, and its action in removing the trustees and appointing another in their stead, are binding upon the stockholder, not on the ground that the stockholders were represented by the company in the proceeding, but because the company itself, rather than the stockholder, was the party entitled to be heard upon the questions thus determined; and the company having been given the opportunity to be heard, no one deriving his interest or right through the company could question the court's action.

And so, as to the *third* matter referred to as having been adjudged by the decree, the stockholder was not a necessary party to the adjudication. The ascertainment by the court of the assets and liabilities of the company was not

only a proper but necessary incident to the inquiry whether the original trustees should be removed for dereliction of duty. And, while the court's order requiring the company to pay the liabilities so ascertained may have been unauthorized, it may be conceded that whatever objection there might have been to this was open only to the corporation. It was an adjudication against the corporation itself and upon liabilities created by it in its own name. The stockholder was unknown in and not a party to the transactions out of which these liabilities arose, and hence was not a necessary party to their adjudication. These liabilities having been determined against the corporation, the party contracting them, and the judgment establishing them rendered in a suit to which the corporation was a party, such judgment becomes the highest evidence known to the law of the existence of such liability by the corporation; and hence the stockholder is unable to question it.

But the *fourth* of these matters — the order or decree requiring the stockholders to pay an assessment — was in no sense an order or judgment against the corporation. The corporation was not assessed by the decree, nor required to pay the assessment. It was not directed or required to make a call or assessment; nor, indeed, could it have been, since the law had imposed the duty and given the power of making calls or assessments, not on the corporation, but on the president and directors. And not only did the decree fail to adjudge any liability or duty against the company in the matter of the assessment, but the record shows there was nothing in respect to the stockholders' liability which the court could have adjudged against the company. The stock subscriptions, or amounts unpaid on them, were not even assets belonging to the company; for the court adjudged these to have been assigned and conveyed to the trustees by the terms of the trust deed. Hence the company could not have collected the assessment. By the terms of the law under which the company was incorporated these subscriptions were made

payable as, or when called for (not by the company, but —) by the president and directors. Hence the company could not have made the assessment.

The company therefore was not required by the decree, or by the law, either to make, collect, or pay the assessment. It had and could have nothing whatever to do with the stock subscriptions. Whatever it might originally have had to do with the subscriptions was held by the court to have been divested by the deed to the trustees. And this being so, we contend that the fact it was made a party to the proceeding before the Richmond court gave to that court no jurisdiction to make an assessment, or decree anything whatsoever affecting the liability on these subscriptions. For, while a court of equity may have jurisdiction over the subject-matter of subjecting stock subscriptions to the payment of corporate debts, its right to exercise such jurisdiction in the particular case must depend upon the parties who are before it in that particular case. If the party or parties before it be such as have no interest or right in the subject-matter, the attempt to exercise the jurisdiction, would, as we submit, be wholly void as against those who were interested and were not made parties. And it is no answer to this to say that the stockholders are parties because the corporation of which they are members is a party. The decree of the assessment in this particular case must be considered as if that part of the decree was the only object or purpose sought to be attained by the suit. As we have said, it is wholly independent of the other matters affected by the decree. Had the complainant only sought to reach the stock subscriptions for the payment of his judgment, the company would have been neither a necessary or proper party; since, as we have shown, it had nothing whatever to do with the stock subscriptions, and nothing could have been adjudged against it in respect to them. In any case to which the company is neither a proper or necessary party it seems absurd to say, that, nevertheless, if it happens to be a party, it is thereby the

agent or representative of the stockholder, and the latter is bound by whatever is done in such case although the thing done has no bearing on the corporation. Much more absurd is it in a case such as was that before the Richmond court, where the liability of a stockholder under his stock subscription contract is the subject-matter sought to be affected, and where the company had parted with all right or interest in the contract, to hold that the company was the representative or agent of the stockholder for the purpose of having the rights or obligations of the contract adjudicated. The relation between the company and its stockholders with respect to the liability under such contract, even where no assignment of the contract has been made by the company, is the relation of debtor and creditor; or, in other words, an adverse relation wholly inconsistent with the relation of principal and agent.

Hatch *v.* Dana, 101 U. S. 205;
Ogilvie *v.* Knox Ins. Co., 22 How., p. 392;
Stephenson *v.* Fox, 83 N. Y. 313 (317),

That the service upon or presence of the Express Company in the proceeding before the Richmond court gave to that court no jurisdiction to make an assessment upon the stock or stockholder, or to render any judgment or decree affecting the liability of the stockholders of the company, seems to us so clear we should not occupy the court with any further discussion of it, but for the fact that in deciding other suits of a similar nature to the one at bar, brought by the defendant in error, against other stockholders, several courts State and Federal, have announced a different conclusion The particular cases which, either directly or indirectly, have ruled on this precise question, are: —

Glenn *v.* Soule, 22 Fed. Rep. 417;
Glenn *v.* Semple, 80 Ala. 159;
Vanderwerken *v.* Glenn, 6 S. E. Rep. 808;
Glenn *v.* Williams, 60 Md. 93.

We respectfully submit, however, that in neither of these cases has this question received the careful consideration its importance deserves; and that the courts have been misled in their conclusions by the failure to properly distinguish the nature of the proceedings before the Richmond court from that of other cases which they have cited and relied upon as precedents and authorities in support of their conclusions. As these decisions will probably be urged as entitled to the consideration of this court, it is proper we should give them a careful analysis.

In the *Soule* case (32 Fed. Rep. 417) Judge Pardee decides the question without argument. All that bears upon it in his decision is the following: —

"I think there can be no doubt of the authority of the "Chancery Court (on the failure of the board of directors) "to make the call necessary to enforce the deed of trust, "and necessary under the terms of subscription to charge "the subscribers to stock with liability for the amounts of "unpaid subscriptions. (See Scovill *v.* Thayer, 105 U. S. "155.) * * * It cannot be contended that all the "stockholders were necessary parties to the proceeding "before the court making the call. (See the Maryland "case, and Sanger *v.* Upton, 91 U. S., p. 56.)"

To what extent (if at all) the learned judge in deciding these two propositions considered the question now under discussion, we are unable to conceive, since the decision simply advises us that as to one of them he entertained no doubt, and as to the other he considered there could be no contention. We conclude, however, that the correctness of the conclusions announced by the judge depends wholly upon the support they receive from the citations he makes of other cases. We shall presently discuss these cited cases with the view of demonstrating that (with the exception of "the Maryland case," to which he refers) they are not authority for the conclusions announced in this case.

In the *Semple* case (80 Ala. 159), all the court says, which has any bearing upon the question, is as follows: —

"It is now well settled that courts of equity may enforce "the payment of stock subscriptions, where directors have "neglected or refused to make assessments and calls "for them in the exercise of their fiduciary capacity."

Of the correctness of this declaration there can be no controversy; nor is it probable it was denied in the discussion before that court. Indeed, it does not seem to have been used in reference to the question of the jurisdiction of the Richmond court, but rather as preliminary to the decision of the issue raised under the Statute of Limitations. In fact, the question whether a court of equity could enforce payment of stock subscriptions against stockholders not parties to the proceeding in which such payment is sought to be enforced, was not considered or passed on in the decision of this case.

In the *Vanderwerken* case (6 S. E. Rep. 808), the court seems to pass on this question as incidental to determining whether the trustee could bring an action upon the assessment in his own name. After deciding that the power to make assessments on the stock did not vest in the trustees, but remained with the President and Directors, and that upon their failure to make them "it was the peculiar pro- "vince of a court of chancery, upon the application of any "creditor interested in the application of the trust to *ad-* "*minister the remedy*," the court says: —

"To this suit the stockholders in their individual capaci- "ties were not necessary or proper parties, and they were "not therefore made parties, *but were left to be represented* "*by the company*. And for this, also, the precedents are "numerous." And the court then refers to the case of *Salmon* v. *Hambrough*, *1 Cas. Ch. 204*; *Hall* v. *Ins. Co.*, *5 Gill*, *484*; *Sanger* v. *Upton*, *91 U. S. 56*; *Glenn* v. *Williams*, *60 Md. 93*; *Ogilvie* v. *Knox*, *22 How. 387*, *and Glenn* v. *Semple*, *80 Ala. 159*, as authorities relied upon to support this proposition.

The case of *Glenn* v. *Williams* (60 Md., p. 93), was the first of the series of cases brought on the assessment in controversy and seems to have marked out the pathway for all of the others. In fact, it may be fairly said of the others that they simply point to the trees already blazed by this Maryland case, without attempting any new line of discovery; a distinction not unmerited, since the opinion in this case seems to cover whatever ground could be made available for reaching the end attained. It is because of the prominence thus given to the opinion in this case, and that we are satisfied its reasoning is fallacious and unsound that we ask a careful perusal of it by the court. We call special attention to certain passages of it to illustrate our criticism upon it.

It first asserts the right of the court, as a court of equity, to make the assessment on the failure of the president and directors to make it, and in support of this assertion cites the cases of

Silmon v. *Hambrough Co., 1 Cas. Ch., p. 204;*
Hall v. *Ins. Co., 5 Gill, 484;*
Ward v. *Griswoldville Co. 16 Conn. 598;*
Sanger v. *Upton, 91 U. S. 56;*
Scoville v. *Thayer, 105 U. S. 155.*

Afterwards it discusses the claim asserted in behalf of the stockholder that the assessment was not binding upon him because he was not a party to the suit in which it was made, and in this connection, the court says: —

"*When the court obtained jurisdiction of the corporation "every stockholder, in his corporate capacity, was a party "to the cause, and was supposed to be represented by the "president and directors who are interested with the man- "agement of the corporate interest of all the stockholders.*"

Again, it says: —

"*If the decree were held to be totally without effect as "against the stockholders because they were not parties to it*

"*in their individual capacities, the consequence would be* "*that the creditors would be without adequate remedy.*"

And, after giving as reasons for this that the stockholders reside in different States and that those residing beyond the State of Virginia, could not be bound by any decree *in personam* against them either upon constructive service or actual service if made outside the State of Virginia, it says: —

"*But are the stockholders in their individual capacities* "*necessary parties to such a proceeding? It is very clear* "*that in any ordinary action or suit against the corpora-* "*tion to establish and recover a debt, the stockholders are not* "*proper parties, except as they are represented by the cor-* "*poration. And yet the judgment against the corporation* "*binds the stockholders unless they can show it was procured* "*by fraud or by collusion. The judgment is conclusive* "*against the corporation and its property, and, upon prin-* "*ciple, those who hold its property or funds for the pay-* "*ment of debts, ought to be concluded except where there has* "*been fraud or collusion. The unpaid subscriptions to the* "*capital stock are the proper assets of the corporation and* "*constitute a trust fund for the payment of its debts; and* "*as against a creditor with an established debt against the* "*corporation by judgment or decree, the stockholder has no* "*right to withhold the funds of the company upon the* "*ground that he was not individually a party to the pro-* "*ceedings in which the recovery was obtained.*"

And having made this argument, it adds: — "But the "question of the right of a court of equity to order or de- "cree assessments or calls upon the unpaid subscriptions "to the stock for the purpose of paying the corporate "debts, without having the individual stockholders before "it as parties to the proceeding, has been settled in the "most authoritative way;" and, as evidence of this concluding statement, refers at length to the two cases of *Hall* v. *Ins. Co.* (5 Gill, 484), and *Sanger* v. *Upton* (91 U. S. 56).

These extracts we think embrace quite fully all the opinion can be said to contain in the way of argument in support of the position that the stockholders were not necessary parties in order to bind them by the assessment in controversy.

As to the cases to which it refers to support the jurisdiction of the Richmond court over the subject-matter of the assessment, we shall presently show that neither of them was at all analogous to the case before the Richmond court; and, in respect to the theory that the stockholder was a party to the suit because the court obtained jurisdiction of the corporation, it is apparent the opinion wholly fails to meet the objection we have already urged against the application of this theory to that portion of the proceeding before the Richmond court relating to the assessment. It confuses the other branches of that proceeding with the assessment, and concludes that because the corporation was the proper party, rather than the stockholder, in the matter of construing the trust, removing the trustees, and adjudging payment by the corporation of the liabilities ascertained, therefore it was the only proper or necessary party in the matter of ordering an assessment against the stockholders. The statement of the court is: — "The judgment is conclusive against the corporation and its property, and, upon principle those who hold its property or funds for the payment of its debts ought to be concluded."

But what judgment is it that is "conclusive against the corporation and its property," and to what "property" does the court refer? If it refers to the matters adjudged against the corporation, the statement is certainly correct. But if it refers to the judgment against the stockholders ordering them to pay an assessment it is manifestly incorrect; for, while in the sense that the corporation had nothing whatever to do with the assessment, and hence could not then or at any time thereafter be heard to contest it, the corporation may be said to be concluded by it; yet this would be equally so if the corporation had not been a

party to the proceeding at all. The fact it was a party gave to the assessment no more conclusive force as against it then it would have had if the corporation had not been made a party. Moreover the statement that the judgment was conclusive against the *property* of the corporation shows the court did not accurately comprehend, or carefully bear in mind the attitude of the corporation; for, as we have seen, the corporatian had no property of any kind, and it was so held by the Richmond court.

We respectfully submit that if the statement that the judgment concluded the corporation and its property had reference to that portion of the decree which adjudged an assessment, the statement was both loose and inaccurate and that the deduction which the court attempted to draw from it that "those who hold its funds or property for the "payment of its debts ought to be concluded," was not warranted by any principle either in law or equity.

It is, however, due to that court to say that in all probability it did not have the assessment decree in mind when using this language; and that the particular matter to which the court intended it to relate was the decree or judgmen allowing indebtedness against the company, and adjudging against the company the duty of paying it. This is manifested by language in the succeeding part of the opinion where the court specifically refers to the "*recovery*" obtained against the company.

Again, admit (as we do) that the stock subscriptions constitute a trust fund for the payment of debts, and that "as against a creditor * * * * the stockholder has no right to withhold the funds of the company upon the ground that he was not individually a party to the proceedings in which the recovery was obtained;" does this confer upon a court of equity the right to compel him to release his hold on these funds, or, more accurately speaking, make him pay his stock indebtedness, without first affording him the opportunity to be heard in his own behalf? No matter whether the stockholder withholds on the ground, as stated

by the court, that he was not individually a party to the proceedings, or on some other ground. Whatever his ground may be, if he has funds of the company which ought to be applied to paying the company's debts, he has "no right to withhold" them. But the questions whether he is withholding funds of the company; or whether the funds he withholds are needed and how much of them are needed, are necessarily involved in the inquiry whether or not he has a right to withhold; and the court has no more authority to determine these against him without a hearing, than it would have to enter a judgment or decree without notice against any other party who might be charged with improperly refusing, delaying, or "withholding" the payment of indebtedness due to the company.

Let it be assumed that the funds the stockholder withholds are trust funds, and that he holds them as trustee for the creditors of the company; does a trustee occupy so inconsiderate a place in the estimation of the law that a court may make of him an exception to the rule applicable to all others, and may bind him by a judgment whereby his interests are affected without giving him the opportunity to be heard?

Another misleading view expressed in the opinion, and which seems to have had its influence on the decision of the case, is that "if the decree were held to be totally without "effect as against the stockholders because they were not "parties to it in their individual capacities, the conse- "quences would be that the creditors would be without "adequate remedy." Why this statement should be restricted by the words "because they were not parties to it in their individual capacities," we do not understand. If the effect of holding the decree to be ineffectual against the stockholders would be to deprive the creditors of an adequate remedy, this effect would result quite the same whether the reason for holding the decree ineffectual was that the stockholders were not parties, or was on some other ground. The use of the word "totally" in this

connection also suggests that the court did not make any distinction between the decree of an assessment and the decree in respect to the other matters before it. Moreover, the decree could not possibly have been held to be "totally" ineffectual except on the theory that the corporation itself was not lawfully served. If the corporation and the trustees were properly before the court, certainly the construction of the trust and the removal of the trustees and the substitution of another was bound to be effectual against the stockholders. And being so, there could be no question the creditors could have secured an adequate remedy through appropriate action on the part of the substituted trustee. But even if it be true that by holding the decree "totally" ineffectual the creditors would be without adequate remedy, this would furnish no ground for the court assuming a jurisdiction which neither the law or the practice of courts of equity assigned to it. If the court did not have jurisdiction to proceed against stockholders without giving them an opportunity to be heard, it could not acquire it simply because the absence of it worked hardship to a creditor or to any one else.

But without dwelling longer on this *Williams'* case, we claim that a careful perusal of the opinion justifies the criticism that the court in deciding it misconceived the rule which binds the stockholder by a judgment against the corporation of which he is a member, by applying it to a matter in which there was no judgment whatever against the corporation, nor any interest of the corporation affected. That the court overlooked the fact that in the proceeding before the Richmond court there were united several distinct and independent matters, each in itself furnishing the basis for a separate proceeding, and calling for distinct and independent relief, and that while the corporation was a proper and necessary party to the granting of relief as to some of these matters, it was neither a necessary or proper party to that branch of the proceeding or decree which sought or adjudged an assessment against the stockholders.

We have thus given a review of what has been said in the several decisions rendered thus far in the *Glenn* cases upon the question of the power of the Richmond court, in the suit pending before it, to decree a call or assessment such as would bind stockholders not parties to that proceeding. It is respectfully submitted that each and all of them (except the *Williams* case) decide the question without furnishing or attempting to furnish an argument or reason in support of the decision; and that in respect to the *Williams* case the argument of the court not only was in no small degree influenced by a supposed hardship, but proceeded upon a misconception of the proceeding before the Richmond court, or of the rule relating to the binding force upon stockholders of judgments against corporations.

Of this case, as well as each of the others, we insist that its weight as authority should depend on whether the authorities it cites and relies on support its conclusion.

We shall now undertake to show that not one of the authorities relied on in the several decisions or opinions above referred to supports or warrants the assertion that the Richmond court, in the proceeding pending before it, had power or authority to make an assessment or call which would be binding on stockholders not parties to that proceeding.

The authorities so cited and relied on are:—

Salmon *v.* Hamborough Co., 1 Cas. Ch. 204;
Ogilvie *v.* Knox Ins. Co., 22 How. 387;
Scoville *v.* Thayer, 105 U. S. 155;
Hatch *v.* Dana, 101 U. S. 205;
Adler *v.* Milwaukee etc., Co., 13 Wis., p. 57;
Ward *v.* Griswoldville & Co., 16 Conn., p. 593;
Sanger *v.* Upton, 91 U. S. 56;
Hall *v.* Ins. Co., 5 Gill, 484.

The case of *Salmon* v. *Hamborough Co., 1 Ch. Cas.*

204, is certainly entitled to all the merit which attaches to "an early decision," since it was decided more than two hundred years ago. The report of the case is quite vague and unsatisfactory. It shows, however, that the corporation in controversy was wholly different from anything with which we are familiar in modern times. The suit is brought against "The Governor assistants and Fellowship of the Merchant adventurers of England, commonly called the Hamborough Co. et al." There seems to have been no capital stock whatever, but the company had power to assess taxes on cloths (in which it or its members were dealers), for the purpose of raising funds with which to discharge the company's indebtedness, and that it had been the custom to make taxes and leviations upon the members and their goods for this purpose. The plaintiff held a bond of the company for £2,000, and it would seem that the members refused to meet and levy sufficient taxes to pay the same. Whereupon the plaintiff filed a bill in the Chancery Court against the company and *several of its members in their individual capacities*, asking relief. The company, though served with process, did not appear, and it had no property subject to distraint; but the members who had been sued in their individual capacities appeared and demurred to the bill on the ground that they were not liable in their individual capacities to pay the plaintiff's demand. This demurrer was sustained and the bill was dismissed. Subsequently the plaintiff presented his petition to the House of Lords, asking for special directions to the Chancery Court for affording him relief. The individual members who had been sued appeared and again demurred to this pelition before the House of Lords, but the company though summoned there also, did not appear. The House of Lords considered that the dismissal by the chancellor as to the defendants who were such in their individual capacities was entirely proper; but directed the chancellor to retain the bill as against the company, issue new process against it and if it failed to appear and answer that the bill

be taken against it *pro confesso*. If it appeared, the chancellor was to ascertain the amount due plaintiff and decree its payment by the company. Such decree was to be served on the Governor, Treasurer, Secretary and other officials, and if payment of the amount as decreed was not made within a stated time, then the chancellor was directed to order the Governor or Deputy Governor and the twenty-four assistants of the said company, or so many of them as by the tenor of their charter constituted a quorum for the making of leviations upon the trade or members of the said company for the use of the said company, within such time as by the Lord Chancellor, or Keeper, shall be thought fit, to make such a leviation upon every member of the company as were contributory to the public charge, as should be sufficient to satisfy the said sum to be decreed to the plaintiff in that cause and to collect and levy the same and pay over to the plaintiff as the court should direct. The said Governor and others were also to be required to reduce such leviation to writing. Provision was made for requiring the Governor and others to make additional leviations in case the one first made should be insufficient to satisfy the amount decreed to be paid to the plaintiff. If any member failed to pay his quota of such leviations, process of some kind was to issue for enforcing payment. *And in case the said Governor and others failed or refused to make the leviation required by the chancellor, process of contempt was directed to issue against them.*

In pursuance of this order the cause seems to have been revived against the company before the chancellor; the company was again summoned, but failing to appear the bill was taken *pro confesso*, and a decree made requiring the company to pay the plaintiff's debt as directed by the House of Lords. Whether the amount was paid or whether any further proceedings were ever had in the cause does not appear.

From the fact that the House of Lords sustained the dismissal of the bill as to the individual members of the com-

pany, but ordered it to be proceeded with against the company itself, the inference is sought to be drawn that members of the corporation were not considered necessary parties to a proceeding in equity having for its object the assessment of members for the payment of corporate debts.

We contend no such inference is warranted. The House of Lords did not undertake to prescribe any general rule at all, but simply confined itself to special directions for that particular case. As well might it be claimed that this case decided it unnecessary for a creditor to reduce his claim to judgment before proceeding in equity; since it appears that the debt due the plaintiff in this case had not been reduced to judgment. No reason is assigned in the report of the case for holding that the individual members were not proper parties to this particular suit. But the fact that plaintiff had not reduced his claim against the corporation to a judgment at law was of itself a sufficient reason for denying to him any standing in court as against the members of the corporation.

Another reason may be found in the fact that *the parties to whom, under the charter of the company, the right and power to make leviations on the members was committed, were within and subject to the jurisdiction of the chancellor.* The members were not directly liable to pay the debts of the company. They were liable only to pay such leviations or assessments as might be made upon them by the "governor and assistants" of the company or a majority of them. And, because of this, the direction of the House of Lords was that the chancellor should order the "Governor and assistants" to make the necessary leviation, and, after they had made it, such process as was customary was to be resorted to against the members to enforce its payment.

But suppose the "Governor and assistants or a majority of them" had failed or refused to make this leviation, what then? Was the chancellor directed to make it in their

stead? Not at all. The directions of the Lords nowhere intimated that such powers existed or could be exercised by the chancellor. All that the chancellor was authorized to do in that event was to issue against these officials its process for contempt. There is not an intimation in this case which authorizes the inference that, if the Governor and assistants should fail to make the assessment the Chancery Court would have the power to make it, in the absence of the members.

The case of *Ogilvie* v. *Knox Ins. Co.* (22 How. 380), which is cited by the Court of Appeals of Virginia in the *Vanderwerken* case as an authority for the proposition that the stockholders were not necessary parties before the Richmond Chancery Court "because they were represented by the company," was a suit brought by judgment creditors of a corporation against the corporation and a number, though not all, of the stockholders, for the purpose of subjecting the liability of these stockholders on their stock subscriptions to the payment of the debts due to these judgment creditors of the corporation. The only question raised in the case as to who were necessary parties was whether the creditors could proceed against some of the stockholders without joining all. The court held that the stockholders were simply debtors of the corporation and therefore the judgment creditor could recover from any one or more of them, leaving those who had to pay to enforce contribution from their co-stockholders. The question of assessment or call, or what parties would be proper or necessary in a proceeding for an assessment or call is not even referred to in the case. Indeed, this case seems to have been cited only because of an expression which occurred in the first part of the opinion, where Mr. Justice Greer, referring to the fact that the bill had been taken *pro confesso* against the corporation, says that the stockholders "being corporators, "are consequently concluded as to the averments of the "bill affecting them *as such*." It will be noticed that the words "as such" are used in a qualifying sense; and an

examination of the briefs of counsel in that case shows that this expression must have relation to such averments of the bill as alleged an obligation or liability of the corporation itself. It was claimed that no proof had been offered at the trial to show the corporation was indebted to the complainants. And it was no doubt to this matter the expression of the court related. Yet, in the opinion of the Virginia Court of Appeals delivered in the *Vanderwerken case*, this expression is quoted with the omission of the qualifying words "*as such;*" the effect of which omission is to make this court declare that upon any and all averments of whatever kind and which affect stockholders only, the stockholders will be concluded if the bill containing such averments happens to be taken *pro confesso* against the corporation.

The Virginia Court of Appeals may believe the law to be in accordance with what it would have been declared by this expression of Mr. Justice Grier with the qualifying words omitted. Indeed, unless such is the law, we are unable to see how the assessment of the Richmond Chancery Court can be held binding on stockholders not parties to the assessment proceeding.

Be that as it may, it is manifest that by failing to quote or read the entire expression of Justice Grier, the Virginia Court of Appeals has misconceived his meaning, and is wholly astray in claiming any support from that expression for the proposition that the stockholders were not necessary parties to the assessment proceeding in the Richmond court.

Scoville v. *Thayer*, 105 U. S. 143, is another of the cases cited which utterly fails to support this proposition. The question as to who were proper or necessary parties to the assessment proceeding was not raised by the counsel nor is it referred to in the opinion of the court.

In the course of the opinion the court declares that "when stock is subscribed to be paid upon call of the company and the company refuses or neglects to make the "call, a court of equity may itself make the call, if the in-

"terests of the creditors require it. The court will do "what it is the duty of the company to do;" and cites in this connection *Curry* v. *Woodward, 53 Ala. 371; Robinson* v. *Bank, 18 Ga. 65; Ward* v. *Mnfg. Co., 16 Conn. 593.* As we have said before, we do not dispute that a court of equity possesses this power. What we claim is that the stockholders are necessary parties to a proceeding in which the power is exercised; and in the several cases in Alabama, Georgia and Connecticut above cited, it will be found the stockholders of the company were made defendants. And in this case of *Scoville* v. *Thayer*, although a case arising under the bankrupt law, it will be noticed that before the petition for an assessment was entertained by the bankruptcy court it ordered notices to be given the stockholders to appear and show cause why the petition for an assessment should not be granted.

Hatch v. *Dana, 101 U. S. 205*, is a case similar to that of *Ogilvie* v. *Knox Ins. Co.* This bill was filed by judgment creditors of the corporation against certain of its stockholders to subject their unpaid stock liability to the payment of complainants' judgments. No attempt was made to obtain from the court a call or assessment on the stock. Indeed, one of the defenses urged in behalf of the defendants was that no recovery could be had without a call or assessment having first been made. This defense the court overruled, holding, as in the *Scoville* v. *Thayer* case, that a court of equity may enforce payment of stock subscriptions, though there have been no calls for them by the company. It cites *Henry* v. *R. R. Co., 17 Ohio, 187; Ward* v. *Manufacturing Co., 16 Conn. 593, and R. R. Co.* v. *McDaniel, 56 Ga. 191*, all of which were suits brought directly against stockholders.

Hence there is nothing in this case of *Hatch* v. *Dana*, which supports the proposition that in an assessment proceeding stockholders need not be made parties.

The same may also be said of the cases of *Adler* v. *Milwaukee, etc., Co., 13 Wis., p. 57; Ward* v. *Griswold-*

ville etc. Co., 16 Conn. 593, and *Dalton R. R. Co.* v. *Daniel et al., 56 Ga. 191;* all of which were creditors' bills brought against stockholders directly, and in which the question of assessment, or who are proper parties to a proceeding for an assessment, was not even considered.

We may certainly claim that as to the cases cited and relied on, to which we have thus far called the attention of the court, they furnish no authority or support whatever to the proposition that because the Express Company was made a party to the proceeding before the Chancery Court of Richmond, the assessment levied by the court in that proceeding was binding upon the stockholders of the company.

In all of them, except the *Hamborough* case before the House of Lords, and which, as we have seen, gave no authority whatever to the Chancery Court to make an assessment, the stockholders sought to be affected were parties to and actually served with notice of the proceeding. In neither of them was it claimed or pretended that the court could make an assessment, or take any step in the direction of subjecting stock liability to the payment of corporate debts, without actual notice having first been given to the stockholder to be affected by such assessment or proceeding.

Two of the cases thus cited and relied upon as precedents for the action of the Richmond court, remain to be examined. They are the cases of *Sanger* v. *Upton, 91 U. S. 56, and Hall* v. *Insurance Co., 5 Gill, 484.*

The case of *Sanger* v. *Upton*, arose under the provisions of the bankrupt law. Upon the *ex parte* application of the assignee in bankruptcy, the bankruptcy court had ordered him to collect the entire amount remaining unpaid on the stock of the bankrupt corporation; and in pursuance of the terms of the order the assignee gave notice both by publication, and by mailing to each stockholder a copy of the order with a demand of payment of the amount claimed to be due. Although the defendant seems to have

resided within the district where the bankruptcy court was held and could, at any time before suit was brought against her by the assignee, have appeared in the bankruptcy case and secured a reconsideration of the order, she did not do so. As she failed or refused to pay the amount due on her stock, the assignee brought this action to recover it, basing his authority to sue on the order of the bankruptcy court above referred to. It was, among other defenses, contended by her counsel that the court could not make the order requiring stockholders to pay, without having first notified them of the application for such order and giving them an opportunity to be heard. Upon this claim the opinion of this court, delivered by Mr. Justice Swayne, is as follows: —

"The order was conclusive as to the right of the assignee "to bring the suit. *Jurisdiction was given to the district "court by the Bankrupt Act (R. S. sec., 4972) to make "it.* It was not necessary that the stockholders should be "before the court when it was made, any more than that "they should have been there when the decree of bank "ruptcy was pronounced. *That decree gave the juris- "diction and authority to make the order.* The plaintiff "in error could not, in this action, question the validity of "the decree; and for the same reasons, she could not draw "into question the validity of the order. She could not "be heard to question either, except by a separate and di- "rect proceeding had for that purpose. She might have "applied to the District Court to revoke or modify the "order. Had she done so, she would have been entitled "to be heard; but it does not appear that any such appli- "cation was made. As a stockholder she was an integral "part of the corporation. In the view of the law, she was "before the court in all the proceedings touching the body "of which she was a member. In point of fact, stock- "holders in such cases can hardly be ignorant of the meas- "ures taken to reach the effects of the corporation. If they "choose to rest supine until cases against them like this

"are on trial, they must take the consequences. Not "having spoken before, they cannot be permitted to speak "then, especially to make an objection which looks rather "to the embarrassment and delay than to the right and "justice of the case. A different rule would be pregnant "with mischief and confusion. *Hall* v. *Ins. Co.*, *5 Gill*, "*484; Sagory* v. *Dubois*, *3 Sandf. Ch. 467.*"

But for this citation of the cases of *Hall* v. *Ins. Co.* and *Sagory* v. *Dubois*, and the expression preceding such citation and apparently having reference to it that, "As a "stockholder she was an integral part of the corporation. "In the view of the law she was before the court in all the "proceedings touching the body of which she was a mem- "ber," there would be nothing in the decision which would indicate the court intended to cover or had in mind any cases other than those which were governed by the provisions of the bankrupt law. But because of this expression, and the citation of the two cases above mentioned, it seems to be claimed not only that this court has stamped upon the rather unique case of *Hall* v. *Ins. Co.* the potential seal of its indorsement, but that it has expressly declared that which, as we shall presently see, the *Hall* case could at most be said only to have implied, that the mere presence of a corporation to a suit is all that is necessary to bind the stockholders of such corporation by any and whatever decree or order a court may see fit to make in the progress of such suit. We are compelled of course to concede that the apparent effect of the citation of *Hall* v. *Ins. Co.* and *Sagory* v. *Dubois* was to give to those cases the indorsement of this court.

But we insist that, neither as the result of such indorsement, or by anything expressed in its opinion, did this court give, or intend to give, its sanction or approval to a view which would enable a court to fasten a direct and immediate liability upon stockholders, without notice to them.

As to the case of *Sagory* v. *Du Bois* (3 Sandf. Ch. 467), it involved no question whatever of an assessment or call

on stock; and no doubt it was cited simply because of the fact that in effect it holds a stockholder estopped, in an action against him by the receiver of a corporation, to question the regularity or propriety of the receiver's appointment. Aside from this the case turns wholly upon the right of a receiver to sue a stockholder under a statute referred to in the decision, which provides: —

"If there shall be any sum remaining due upon any "share of stock subscribed in such corporation, the re- "ceivers shall immediately proceed and recover the same, "unless the person so indebted shall be wholly insolvent, "and for that purpose may file their bill in the Court of "Chancery or may commence and prosecute an action at "law for the recovery of such sum, without the consent of "any creditors of such corporation." (2 R. S. N. Y. (1836), p. 1469, sec. 69.)

Doubtless this court, or the distinguished member of it who delivered its opinion in *Sanger* v. *Upton*, considered that inasmuch as the receiver in the one case and the assignee in the other derived their right to collect the unpaid subscriptions from provisions of statute, the ground for holding the stockholder estopped in the one case from questioning collaterally the propriety or regularity of the court's order directing the assignee to collect, was analogous, in principle at least, to the ground for holding the stockholder estopped in the other case from questioning collaterally the propriety or regularity of the court's action in appointing the receiver. And in this view only the citation of this case of *Sagory* v. *DuBois* can be considered appropriate or relevant.

The effect to be given the citation of *Hall* v. *Ins. Co.* will be better understood in connection with the particular review of that case which we shall presently attempt. Suffice it for the present to say that the citation of it in the opinion of *Sanger* v. *Upton* fairly justifies the inference that this court, or at least the learned judge who delivered the opinion, considered that this *Hall* case had properly

determined the question of jurisdiction in courts of equity to make assessments on unpaid stock. At the same time we claim that the decision in *Sanger* v. *Upton* did not require the consideration by the court of what jurisdiction over the matter of assessments on stock resided in courts of equity, but only what jurisdiction resided in bankruptcy courts under the provisions of the bankrupt law to collect the assets of a bankrupt corporation. Under the provisions of that law the entire estate, the *corpus*, of a bankrupt corporation is vested immediately and absolutely in the assignee, and the court in bankruptcy is given in express terms jurisdiction to collect all of the assets and direct their distribution. (U. S. Revised St., sec. 4972.) It is not clear from the opinion whether the decision was based on the idea, as expressed in one part of the opinion, that in a proceeding of that character all of the stockholders are presumed to be in court; or whether the fact the corporation was shown by its own schedules and by the claims proved against it under the law, to be wholly insolvent, made it unnecessary for the court to do more than was done in that case, order the assignee to collect from the stockholders their unpaid subscriptions; in which latter view it was undoubtedly proper to consider the stockholder as having full knowledge of the schedules filed by the corporation itself, and of the claims allowed against the corporation and the effect of these on the stock liability, and to hold him bound thereby. In other words, to hold, as was in effect held in that case, that if he would question the truth or effect of these schedules or the validity of these allowances, he must do so in the proceeding in which they were filed, and not collaterally.

Another feature in the case which is expressly referred to in the opinion, and which materially distinguishes it from the case before the Richmond court, is that in the charter or law under which the corporation was created, there was no provision whereby the payment of stock subscriptions could be deferred until calls or assessments were made; nor was authority given to any person or body of persons to

make calls or assessments on the stock. Under a by-law or regulation of the company, the balance unpaid on the stock was only subject to call of the directors when directed to make such call by a majority of the stockholders. But this was not a charter regulation and could have no effect on the rights of creditors. (Morse on Corp., sec. 390.) As to them, or the assignee representing them, there being no charter provision authorizing any delay in the payment of the entire amount of the subscription, a call or assessment was not a prerequisite to the collection of the balance remaining unpaid. And this view seems to have been in the mind of the court in deciding the case. Indeed, the question of who are proper parties to an assessment proceeding is not considered at all. But whatever may have been the view which controlled the decision, we submit that the case cannot fairly be considered as determining any question of jurisdiction arising outside that which was conferred on the bankruptcy court by the provisions of the bankrupt law.

It was so considered by the Supreme Court of Iowa in the case of *Lamar Ins. Co.* v. *Hildredth* (*55 Iowa, 248*), where it was held that a court of equity could not make an assessment binding on stockholders not parties to the proceeding in which it was made.

It is therefore unnecessary, for the purposes of the case now before the court, to inquire whether upon a reconsideration, this court would adhere to the views expressed in the opinion delivered in *Sanger* v. *Upton*. We insist that giving to these views the broadest interpretation of which they are susceptible, they would not sanction the jurisdiction which was attempted to be exercised by the Richmond Chancery Court, where none of the conditions existed, to which we have above referred as having been present in the *Sanger* v. *Upton* case.

We come now to the last of these cited cases, that of *Hall* v. *Ins. Co.*, which is the first case (so far as we can discover) which ever asserted the power of a court of equity,

even where the assets of a corporation were being administered by the court through a receiver, to make an assessment which would be binding on stockholders not parties to or having notice of the proceeding.

It was decided more than fifty years ago; and while, in the interval which has elapsed since it was reported, the ingenuity of the profession has been taxed to the utmost in behalf of creditors of insolvent corporations, to reach the liability of stockholders by the most speedy and inexpensive proceedings, yet (so far as we have been able to find), jurisdiction over stockholders not parties before the court was never afterwards exercised or asserted by a court of equity until the decision of the *Glenn* case by the Richmond Chancery Court.

It appears in this *Hall* case, that at the suit of one or more judgment creditors against an insolvent insurance company, a court of equity had placed the property and estate of every kind belonging to the corporation in the hands of a receiver for the purpose of having all the affairs of such corporation fully administered or liquidated under the order of the court. In the course of the proceedings the court made an order on the receiver to notify the stockholders to pay the balance remaining unpaid on their stock within a certain time, and upon their failure to to pay the receiver was ordered to bring suit for same. The defendant stockholder, having failed to pay, this action was instituted against him for the amount due on his stock. It was claimed in his behalf that as he was not a party to the proceeding or suit in which the order had been made, no action could be maintained against him upon such order. And this defense was overruled in the following language:—

"The proceedings of Baltimore County Court when sit-
"ting in equity which were objected to as evidence were
"not offered as an adjudication of any of the rights of the
"parties in any suits between them and upon that ground
"as admissible evidence in the present controversy; but

"were offered without reference to the parties thereto for "the purpose of showing by what authority the present "action was prosecuted. In that aspect of their being "offered they are obnoxious to neither of the reasons "offered for their rejection. *The court's order for the in-* "*stitution of this suit was definite and final. As to the* "*power exerted by Baltimore County Court sitting in* "*equity in the proceedings before it, it is believed no well-* "*founded exception can be taken.* It was indispensably "necessary for the prevention of fraud, and to do justice to "persons whose grievances were undeniable and incapable "of relief anywhere else or in any other way than in that "pursued by the county court. In such a case and under "such circumstances it cannot be necessary to cite author- "ities to establish the propriety of the exercise of such a "power."

It will be observed the decision of the court refers to no precedent or authority for its ruling. Indeed, after a careful search, we may confidently assert that this is the first case to be found in the books in which it was ever claimed that a court of equity could make an order of this kind binding upon a stockholder without having made him a party to the proceeding in which such order was made; or, at least, without giving him notice to appear and show cause why such order should not be made.

It is not clear from the opinion in the case on what ground the court considered such notice unnecessary. Indeed, it may not have so considered at all, for the court may have regarded the notice given that the order had been made was sufficient to afford the stockholder ample opportunity if he had chosen so to do to come in while the proceeding was pending and move to have the order vacated. The defendant must have been within the territorial jurisdiction of the court, since the suit brought against him by the receiver was instituted in a court located in the same city as that in which the court making the order was located. Moreover, it will be observed from

the opinion in the case, that the court asserts no general rule or principle governing its action, but expressly confines its ruling to the circumstances of that particular case. The brief manner in which the opinion disposes of the question of the right of the Chancery Court making the order to make it, rather indicates that the court did not appreciate it was establishing a novel precedent. In fact, the court seems to have considered that the decree appointing the receiver and investing him with all the property and rights of action belonging to the corporation, was in itself sufficient to entitle him to recover the unpaid stock liability from the stockholder without any special order of assessment or call by the court. And this, on the theory stated by the court in the case of *Sanger* v. *Upton* (*supra*), that where the corporation is insolvent the necessity for making any formal call or assessment no longer exists; the fact of insolvency *proprio vigore* effecting a call of whatever is needed for the payment of debts. That in such cases the court has simply to ascertain the amount needed and to direct its officer, the receiver, to collect it. As said in the opinion in the case of *Sanger* v. *Upton*: "The "assignee might have filed a bill in equity against all the "delinquent shareholders jointly (Ogilvie *v.* Knox Ins. Co., "22 How., p. 380). But if the company is utterly insolv- "ent, in any event, a separate action at law in each case is "much to be preferred. It is cheaper, more speedy and "more effectual. If the contingency should occur that "the assets realized exceed the liabilities to be met, the "district and circuit courts will see that no wrong is done "to those adversely concerned."

Giving to the case the broadest scope and meaning of which it is susceptible, we submit the most that can be claimed for it is, that where a court of equity, in a suit brought by creditors against an insolvent corporation, has taken possession and control of all the assets belonging to such corporation, and placed the same in the hands of its receiver, for the purpose of administering and liquidat-

ing the affairs and business of such corporation according to the court's discretion, the stockholders or members of such corporation will be presumed to have notice of all proceedings relating to such assets, or the administration thereof, which may be taken by the court in such suit; and that by virtue of this presumption, the court may, without previous notice thereof being given to the stockholder, order such receiver to collect from stockholders whatever of the unpaid stock subscription the court may deem necessary to be collected for the purposes of such administration or liquidation.

From this review of the cases relied upon by the courts that have held the assessment of the Richmond court valid and binding on the stockholders, it is manifest that in only two of them (*Sanger* v. *Upton* and *Hall* v. *Ins. Co.*), did the court attempt or claim the right to make any order or decree affecting the liability on stock subscriptions without first giving to the stockholders who were to be affected by such order or decree notice of the proceeding and opportunity to be heard. And of these two cases, the one of *Sanger* v. *Upton*, arose under the peculiar provisions of the bankrupt law, by the terms of which all of the assets, legal and equitable, of the corporation, were vested absolutely in the assignee in bankruptcy, to be held, both as to their collection and disposition, subject to the direction and discretion of the bankruptcy court; while the other (*Hall* v. *Ins. Co.*), was a case where a court of equity had, by its decree, taken possession of or sequestered all of the assets of the corporation and placed them in the hands of its officer, to be administered or realized upon and distributed, under the direction, discretion and control of the court.

In the bankruptcy case the entire assets of the corporation (including amounts unpaid on stock subscriptions and every other chose in action), had become subject absolutely to the direction and control of the bankruptcy court by operation of the bankrupt law. In the other case, the court

had acquired possession and control of all the assets of the corporation by its own decree, and held the same through its ministerial officer, a receiver, to be controlled, realized upon and administered according to the court's own judgment and discretion. In both cases, the assets were in possession and control of the corporation at the time the proceeding against it was instituted. In both cases the decree of the court operated to divest the corporation of them and vest them in the court, or its officer, in the equity case, and in the assignee, in the bankruptcy case. There can be no question that the corporation was the only necessary party, and that the individual stockholders were neither necessary or proper parties in either case, to the divesting of the assets out of the corporation and vesting them in the assignee or the court. The corporation, being the sole owner of these assets, was the only party against whom the creditor seeking to have the court take these assets into its own control, was required to proceed. Having thus acquired these assets, including whatever rights of action the corporation had upon the stock subscriptions, these courts seem to have considered the proceedings concerning their administration, as in some sort proceedings *in rem*, and that they were entitled, without notice to any one, and simply on application of the assignee, receiver or creditor, to order the assignee in the one case, and the receiver in the other, to collect from the stockholders, by suit or otherwise, the amounts unpaid on their stock.

And it is at this point we insist that although, with respect to the bankruptcy court, the right so asserted may be sustained by reason of the peculiar features of the bankrupt law, yet, with respect to the court of equity, this view assumed a right or jurisdiction for which there was no warrant, either in precedent or reason. Conceding the equity court, whose action was under review in the case of *Hall* v. *Ins. Co.*, had by its decree acquired whatever rights of action the corporation possessed, yet the corporation itself could

not have maintained an action on the stock subscriptions until an assessment or call had been made by its president and directors. How then could the court acquire, or give to its receiver, any greater or different right? Had the president and directors made a call, unquestionably the receiver could do what the company could have done, maintain an action against the stockholder for the assessment made by the president and directors, for the reason he had expressly contracted to be bound thereby. But he had not agreed that the court should make an assessment or call, or to be bound by that. So that while the court could make it if the president and directors failed to do so, yet the validity or binding force of its act in that behalf could not be derived from any contract or agreement with the stockholder. It would necessarily involve the assertion against the stockholder himself of a right in the court to create a liability or obligation which under the stockholder's agreement, was to be created by another and different tribunal. For the court to determine the right so asserted so as to bind the stockholder, the immediate and indeed the only party against whom this right is asserted, it must, under the fundamental rule pertaining to jurisdiction, give to such stockholder the opportunity to appear and show cause why this right should not be exercised by the court. And this right to be heard, is not to be determined by a subsequent disclosure that no cause could have been shown had the opportunity been given. The question goes to the jurisdiction in the first instance; and if a party sought to be affected was not given the opportunity which the law requires to be given him, then we insist the order, judgment, decree — every act and step taken by the court in the matter — is, as against such party, null and void.

But if this were not so; if it be true that a court of equity, by virtue of the fact of having taken from the corporation all of its rights of action and assets for the purpose of collecting and administering the same according to its

discretion, may determine, without a hearing and without notice to stockholders, that the facts exist which entitle the court to substitute its own judgment for that of the president and directors, adjudge the amount the stockholders shall pay; and order its receiver to collect the same; there would still be no foundation or authority for the exercise of such power in the case before the Richmond Chancery Court. In that case the corporation was possessed of no rights of action or other assets either at the time the proceeding was instituted or afterwards; nor did the court acquire any rights of action, or take possession of any property, or appoint a receiver to take such possession for it. All the assets which formerly belonged to the corporation, had, long before the proceedings were instituted, been transferred and conveyed by the corporation to third parties, and the court held that this conveyance divested these assets out of the corporation and vested them absolutely in the three trustees, to be held and administered by them in accordance with the terms of the deed. Moreover it refused to take this property, or any part of it, from the trustees or out of the terms and provisions of the trust. On the contrary, the effect of its decree was to confirm the trust and require its effective execution. In short, neither the court, or any officer of the court, acquired or became possessed of any property or rights of action belonging to the corporation. The decree in effect determined that the corporation had no property to take and had nothing whatever to do with the administration of the trust. There was then no property in the custody of the court on which it could act as in a proceeding *in rem*. There was nothing which could be, or was, adjudged against the corporation in respect to the administration of the trust, or the assets belonging thereto. As to the stockholder, therefore, there was nothing pertaining to the assessment, or the subjecting of his liability to the payment of debts, in which the corporation could properly be sued, and hence nothing on which to base a presumption that the corporation represented or was the agent or substi-

tute of the stockholder in a proceeding to procure such assessment.

Moreover, as the trust deed was held valid, the court could acquire no broader or different jurisdiction to decree an assessment, because asked for by a creditor, than it would have possessed in case such assessment had been solicited by the trustee. If the fact that the company had conveyed to the trustees the right to unpaid stock subscriptions precluded creditors from proceeding against the stockholders directly, then in order to avail themselves of the stock subscriptions the creditors were compelled to look to the trustee to collect such subscriptions for them. And, if the trustee failed to act, they could invoke the aid of the court to compel him to do so, or have him removed and some one appointed in his stead who would act. And this, in effect, was in reality the nature of the proceeding before the Richmond court. It might well be claimed that when the court had appointed a new trustee because the original trustees had failed in their duty, it could not take any step whatever toward the execution of the trust until after the new trustee had moved for that purpose; or, at least, had been derelict in so doing. But in any event, it had no power to take any step in this direction different from that it would have been authorized to take if its action had been at the instance of the trustee. It was the right of the trustee to the assessment which the court would be enforcing, not the right of the creditor. The creditor's right was against the trustee. But the right to proceed against the stockholder was the right of the trustee. And to enforce this right, if, as was held by the Richmond court, the trustee could not reach the stockholder until a call or assessment was first made, the first duty of the trustee would have been to demand of the president and directors, the parties upon whom the law imposed the duty, to make the call. If they refused to make it, and, from any cause, whether of their non-residence in any one jurisdiction or other reason, they could

not be brought before the court and compelled to make it, then the trustee could have procured an assessment by a court of equity. But in such case, against whom could such an assessment be made? Who would the trustee proceed against? Clearly, not the corporation, for it could not make it. Nor against the president and directors, since process could not be had on them. Necessarily, therefore, the trustees would be compelled to make the stockholders themselves parties to the proceeding. And if so, certainly only such stockholders as were made parties to and notified of the proceeding could be bound by its result.

True, this would have been less convenient, and involved more expense, since it would require the trustee to bring suits in several different States, the stockholders not being all residents of any one state. But convenience and expense are not the tests for determining jurisdiction of parties. They may sometimes furnish a reason or excuse for the non-joinder of parties and for proceeding against those only who are actually served with process. But they can furnish no ground or warrant for adjudging or determining duties or obligations against those who are not joined and have not been served with process.

Second. While we deny the right of a court of equity to make an assessment under any circumstances, which would be binding on stockholders who were not given an opportunity to be heard before the assessment is made; yet, if it be considered that by making the president and directors parties to the suit before the Richmond court the necessity for notice to the stockholders would have been avoided, we insist this could be so only in the event the president and directors, or a majority of them, had been personally served with process.

The strongest reason that can be urged in favor of the view that the stockholders would have been bound, had the president and directors been before the court, is that in the matter of making calls or assessments the stockholders had constituted these persons their agents or representatives.

Hence, if the court having these agents before it, had ordered them to make a call or assessment and they had failed to comply with the order, the court might have made the assessment itself; and, inasmuch as they, being parties would have been concluded by such action, the parties for whom they were such agents or representatives, would be concluded also. But the record shows there can be no application of such view in the case before the Richmond court. Only two out of eight directors were served with notice. The six others (including the president) were non-residents of the State of Virginia, were notified only by publication in a newspaper published in the city of Richmond, and neither of them appeared before the court, either in person or by attorney.

We deem it unecessary to inquire whether under the laws of Virginia this notice by publication, authorized the Richmond court to proceed as if these parties had been personally served. If it did, the only effect would be to bind persons or property within that State. But the plaintiff in error in the present case was not a resident of Virginia, and the action against him was not instituted within that State. It is settled by numerous decisions of this court that whatever may be the effect of such proceedings in the State where they are conducted, they can have no force or effect whatever against persons or property in jurisdictions beyond the limits of that State.

Pana *v.* Bowler, 107 U. S. 529;
St. Clair *v.* Cox, 106 U. S. 350;
Pennoyer *v.* Neff, 95 U. S. 714;
Windsor *v.* McVeigh, 93 U. S. 274;
D'Arcy *v.* Ketchum, 11 How. 165;
Thompson *v.* Whitman, 18 Wall. 457;
Galpin *v.* Page, 18 Wall. 350.

In the case of *Thompson* v. *Whitman*, *supra*, after reviewing the previous decisions on this subject, the court

says: "On the whole we think it clear that the jurisdic-
"tion of the court by which a judgment is rendered in any
"State may be questioned in any collateral proceeding in an-
"other State, notwithstanding the provisions of the fourth
"article of the constitution and the law of 1790, and not-
"withstanding the averments contained in the record of
"the judgment itself." And in the same case it is declared that want of jurisdiction may be shown either as to the subject-matter, or the person, or, in proceedings *in rem*, as to the thing.

In the case of *Galpin* v. *Page*, *supra*, this court says: —

"Whenever, therefore, it appears from the inspection of
"the record of a court of general jurisdiction that the de-
"fendant against whom a personal judgment or decree is
"rendered, was, at the time of the alleged service, without
"the territorial limits of the court, and thus beyond the
"reach of its process, and that he never appeared in the
"action, the presumption of jurisdiction over his person
"ceases, and the burden of establishing the jurisdiction is
"cast upon the party who invokes the benefit or protection
"of the judgment or decree. This is so obvious a prin-
"ciple, and its observance is so essential to the protection
"of parties without the territorial jurisdiction of a court,
"that we should not have felt disposed to dwell upon it at
"any length, had it not been impugned and denied by the
"Circuit Court."

And in this opinion the court declares further: "The tribu-
"nals of one State have no jurisdiction over the persons of
"other States unless found within their territorial limits; they
"cannot extend their process into other States, and any
"attempt of the kind would be treated in every other forum
"as an act of usurpation without any binding efficacy."

And in the case of *Pennoyer* v. *Neff*, *supra*, where the former decisions of the court on this question are fully reviewed, the court declares: "Substituted service by
"publication, or in any other authorized form, may be
"sufficient to inform parties of the object of proceedings

"taken where property is once brought under the "control of the court by seizure or some equivalent "act. The law assumes that property is always in "the possession of its owner, in person or by "agent; and it proceeds upon the theory that its seiz- "ure will inform him not only that it is taken into the "custody of the court, but that he must look to any pro- "ceedings authorized by law upon such seizure for its con- "demnation and sale. Such service may also be sufficient "in cases where the object of the action is to reach and "dispose of property in the State, or of some interest "therein, by enforcing a contract or a lien respecting the "same, or to partition it among different owners; or, when "the public is a party, to condemn and appropriate it for a "public purpose. In other words, such service may answer "in all actions which are substantially proceedings *in rem*. "But where the entire object of the action is to determine the "personal rights and obligations of the defendants, that is, "where the suit is merely *in personam*, constructive service "in this form upon a non-resident is ineffectual for any "purpose. Process from the tribunals of one State cannot "run into another State, and summon parties there domiciled "to leave its territory and respond to proceedings against "them. Publication of process or notice within the State "where the tribunal sits cannot create any greater obliga- "tion upon the non-resident to appear. Process sent to "him out of the State; and process published within it, are "equally unvailing in proceedings to establish his personal "liability."

Under these decisions it is clear that the Richmond court could not have made an order on these non-resident directors which would be valid or binding on them, nor could they have been bound by any assessment the court itself might make in the case before it. The record here shows, that although two of the directors were residents of the State of Virginia, and were per-

sonally served, yet, under the by-laws of the company, a majority of the directors were necessary to constitute a quorum for the transaction of business, and hence the two thus served could not have been required to act. The majority, therefore, must be the supposed agents or representatives of the stockholders. And as the majority were not before the court, and the assessment made by the court could have no binding force or effect against them, certainly it could not be held to have any binding force against the stockholders for whom the majority was supposed to be such agents or representatives. Especially would this be the case as against a stockholder, such as the plaintiff in error, who is not a resident of Virginia and not sued in the courts of that State. However binding under provisions of the Virginia statutes, such assessment might be considered as against stockholders residing, and sued on such assessment in tribunals within that State, we submit it can have no binding force or effect whatever against other stockholders sued in other tribunals.

II.

Plaintiff's suit was barred by limitation.

The fourth defense in the answer was that the plaintiff's cause of action did not accrue within three years before the commencement of his suit. [Pr. Rec. p. 9.] This the court, by its instruction to the jury, overruled; and, in so doing, erred. [Pr. Rec. p. 15.]

As actions on contracts express or implied, by the statutes of North Carolina in force in November, 1883, and for twenty-five years before, were limited to three years from the accruing of the right of action; and as this was clearly

one on contract, it was undoubtedly barred, unless the right accrued within three years prior to November, 1883.

N. C. Code of Civ. Proc. 1883, pp. 51–58, §§ 138, 151, 155;
Battle's Rev. Stats. 1873, pp. 147, 149, 150, §§ 16, 30, 34;
Moore & Bigg's Rev. 1855, p. 372, § 3.

The right or wrong of the ruling as to this, depends, then, on the question of when the cause of action accrued. Was it in December, 1880, when the plaintiff was appointed trustee in the deed of assignment in place of the original trustees, and was ordered by the Virginia court to collect thirty per cent. of the unpaid stock subscriptions? Or was it fourteen years earlier, and seventeen years before the suit was begun, when, in September, 1866, the original trustees were appointed by the president and directors; were vested with the title to all of the unpaid subscriptions; and were, in effect, directed to collect all thereof without unnecessary delay?

Or, if not at either of those times, was it yet at the expiration only of a reasonable time after the assignment to the trustees in 1866, within which they with proper diligence might have caused a call for the unpaid subscription to be made?

The defendant in error insists that it was at the first named period. We contend that it was either at the second, or, at the furthest, at the third; and if at either of these two, that then the action was barred.

In determining when it did accrue, it must first be borne in mind, that the plaintiff in the action is only the substitute of the original trustees, and is in no better position than they. He takes his title from them and stands in their shoes. If they would have been barred, so also is he.

Next it must be considered what the nature of the defendant's obligation as a stockholder, out of

which the cause of action arose, was, and how, with reference to the accruing of that cause, it was affected by the assignment to the trustees. If its nature was such as that the sum subscribed was payable at certain fixed times, in named installments, then it is plain that no cause of action could accrue upon it, for the several installments, until the arrival of the times so fixed for their payment respectively. Or, if it was such, as that the sum was payable only in case it was needed to pay losses and expenses of the company, and to the extent and when the president and directors of the company might determine it to be so needed, then also the accruing of it would depend upon the existence of such losses and expenses, and the arising of a need for its payment to meet them, as well as upon its being determined by the president and directors that it was so needed. So, again, if it were such as that the sum was to become payable, only, if a majority of the stockholders of the company should by vote instruct the directors to call upon the subscriber to pay it, then too it would seem that no cause of action would accrue till, by such vote, the instruction should be given.

But if, on the other hand, the nature of the obligation was such as that the time for payment of the sum subscribed, or any installment of it, was not definitely fixed; or as that no condition of there having been losses or expenses making it necessary for it to be paid, as well as a determination of the directors that such necessity existed was required for the making it to be payable; or, as that no prior vote of stockholders was made a condition precedent to its becoming due; if nothing in the nature of a condition was annexed to it, except a provision that the time or times of the payment of the sum promised or any part of it, should be such as should be fixed by the company or its president and directors, "calling for" it, or "requiring" it then the determination of the time of the accruing of a cause of action upon it, we submit, depends upon quite different considerations. In the case of one thus payable, as "called

for," or "required," by the company or its managers, while the time of its maturity would be uncertain, yet it is evident that in every respect, except the time of maturity, it would be unconditional and absolute; and, as to that even, it also would be capable of being made certain at any time, by the mere exercise by the company, or its managers, of their volition to have it made so. Such an obligation, we submit, cannot be held to be a conditional one, except in the sense that every obligation payable on the demand of the obligee is so. Indeed, such an one is, in effect, but one payable on demand. To "call for," or to "require," is but to "demand, to ask as of right and by authority."

See Webster's Dictionary, Title, Require.

And that the power of making the requisition is lodged in the "president and directors," and not in the general body of the company, can make no difference as to this. They are its managing body, through whom it acts, and by whom alone in the great mass of its transactions, its will is expressed. And the power is one, the exercise of which, upon application by the company, or its creditors, or representatives, they would have no right to refuse.

That the obligation to pay money subscribed to the stock of corporations as "called for," or "required," by the president and directors, is but that of a debt payable on demand, has been several times decided.

Thus, in Goshen Turnpike Co. *v.* Hurtin, 9 Johns 217, it was held as to a note given to a corporation "for five shares of stock of the company, and payable at such time and in such proportion, as the president and directors should require," "that it was payable absolutely, and not depending on any contingency; and was, in effect, payable on demand." And the opinion was concurred in by all the members of the court, of whom Chancellor Kent was then the Chief.

In Howland *v.* Edmonds, 24 N. Y. 310, in an action upon a note given to an insurance company, in which the maker promised to pay $580 "in such portions and at such times as the directors might require," it was held

the note was payable on demand, could be sued on at once, and that limitation ran upon it from its date In a very able opinion by Denio, J., it was said of the note, "it was payable on request, which the law construes to mean immediately, if such be the pleasure of the holder. The directors, whose determination as to the time of payment is mentioned in the note, were, as the governing power of the corporation, the holder of the paper; and the statement, that the money should be payable at such times as they might require, was in effect a provision that it should be paid on the demand of the payees."

In Stillwell *v.* Craig, 58 Mo. 24, 31, it was held that a note expressed to be for value received in a certificate for ten shares of stock of a company, and payable "in installments not to exceed ten per cent. on each share at thirty days' notice of call from the board of directors," was not so uncertain as to time of payment as to make it a non-negotiable note; and it saw said by the court, that, in the element of certainty of time of payment, no difference was perceived in principle between such a note, and one payable on demand. In Upton *v.* Tribilcock, 91 U. S. 45, it was said of a certificate of stock issued to the defendant, by which it was stated that the holder was entitled to 100 shares of $100 each, payable as to 20 per cent. in four installments of five per cent. at fixed times, and the time and manner of the payment of the residue not specified; but such residue, alleged in the complaint to have been payable as called for by the company, and the certificate stamped non-assessable, that "the legal effect of the instrument was to make the remaining eighty per cent. payable upon the demand of the company."

Thus, then, there is ample authority for the view, if any were needed, that the obligation of a subscription to stock, payable as "called for" by the president and directors of a company, is that of a contract to pay on demand. And if the contract of the defendant in this action

was merely to pay the sum subscribed at times and in amounts as called for, or required, by the president and directors, then in determining when a cause of action upon it arose, we may properly regard its obligation as being that of one due on demand, and may apply to it whatever rules or principles are applied to such obligations, with reference to the bar of the limitation. But, upon examination of the record, that is just what we find the contract to have been. The bill of exceptions [Pr. Rec. p. 13] says that the stock was "divided into shares of $100 each, of which a part was payable at the time of subscribing, and the balance as called for by the president and directors;" and in the "opinion of court," filed with and made a part of the decree of December 1880 [Pr. Rec. p. 45], it is stated that by chapter 57 of the code of Virginia for 1873, and 1860, it is provided, that "upon every subscription for shares in any joint stock company there shall be paid upon each share two dollars at time of subscribing, and the residue thereof as required by the president and directors" [Pr. Rec. p. 67]. This being the evidence, the legal effect of the defendant's subscription was that of a promise to pay on each share taken by him $2 at once, and $98 upon the demand of the president and directors. If instead of subscribing for stock upon the terms of $2 cash, and balance as called for by the president and directors, he had borrowed $100 from the company, and given it his note payable as "called for," etc., in the same way, there could certainly be no doubt that his note would be payable on demand. No more, we submit, can it be doubted, that his obligation as to the $98 per share of the stock was also one payable on demand. Nor, we further submit, can it be doubted, that it was so payable, independently of any question, whenever the demand might be made, of there being any necessity existing on the part of the company to prompt the making of it. However unlikely it might be that the directors would demand it, except in case of the affairs

of the corporation being such as to make it necessary for it to have it, and whatever might be his right as a stockholder to demand of the directors good faith and a proper administration of their trust, yet to any demand made by them for the $98, it would have been no defense for him to have alleged that its payment was not needed. In legal effect his promise was to pay the whole $98 when demanded, whether at one time, or in several installments at different times; and if the directors had demanded the whole of it the next day after the subscription he would have been bound in law to pay it. It was *debitum in præsenti, solvendum in futuro;* the uncertain future to be made certain, whenever the president and directors willed it.

But, taking it as true, that the obligation of the defendant as to the unpaid $98, was that of a promise to pay on demand only, at what time would a cause of action accrue upon it? Would an actual demand, a "calling for," or "requiring" of it, or some part of it, be necessary to set the statute in motion? Or would the cause of action accrue immediately, and without any actual demand, and the statute start at once?

Judged by the rule governing ordinary obligations for the payment of money on demand, the answer would be that no actual demand would be necessary to set the statute in motion, but that a cause of action would accrue, and the statute begin running, immediately. Such is the well settled rule, as to notes payable on demand, and also as to other money obligations.

Angell on Lim. (6th Ed.), pp. 93, 94 and 95;
2 Daniel on Neg. Inst. (1st Ed.), § 1215;
Andreas' Appeal, 11 W. Notes Cases, 294, (Sup. Ct. Pa. 1882);
McMullan *v.* Rafferty, 89 N. Y. 458;
Easton *v.* McAllister, 1 Mo. Rep. (side) p. 662;
Codman *v.* Rogers, 10 Pick. 119.

And, looking merely to the form of the contract, and ignoring the *quasi*-confidential relation — growing out of a common interest — that exists between the corporate body and its members, there is no apparent reason why the rule should not apply to the obligation to pay a stock subscription on demand, as well as to any other. But for that relation, and taking the actual language of the contract as the index of its legal effect, it would seem to be capable of being sued upon at once, without demand.

Inasmuch, however, as the relationship between the company and the stockholders is such, as that it may be presumed that the adverse interest, which exists between the ordinary creditor and his debtor, is qualified by it; and that, therefore, there is an implication that the money subscribed to be paid on demand is in fact not to become payable at once, but is, by consent of the creditor, to be retained by the debtor until an actual demand is made for it, it is not unreasonable to believe that as to such obligations the ordinary rule does not apply; that as to them, as between the company and the stockholder—the intention is that there shall be an actual demand before there is a right of action; and that the mere bringing the action itself shall not be a sufficient demand.

But, however this may be, it is obvious that after the corporation has transferred the debt to a stranger, as between whom and the stockholder, there is no intimacy of relation, feeling or interest, as against whom he is as much interested to resist the claim, as he would be the holder of any other kind of obligation made by him, — then no reason exists for not applying the general rule governing the right of action on debts payable on demand. From the time of the assignment of the debt, there is no ground to infer that the debtor designs, or the creditor expects, that the sum promised shall be retained by the debtor until the creditor actually demands it. From then on the reason of the thing would seem to require that the debt should be held to be immediately due, and the statute, as in the case of

others payable on demand, to begin to run at once. Especially would this be so where the assignment was to an assignee for creditors for the expressed and distinct purpose of collecting the debt as quickly as possible, and "*without unnecessary delay*" as here [Pr. Rec. p. 25]. As against him there could not be the slightest inference of an intent to indulge the debtor, but just the contrary.

And this view is in line with the now well settled doctrine, that, as between the creditors of an insolvent corporation and the stockholders, the unpaid stock is a debt due at once, without further demand; and that, to entitle them to collect it in equity, no making of a call either by directors, or by a court, is essential. See

Henry et al. *v.* Vermillion & A. R. R. Co. et al., 17 Oh. 187;
Hatch *v.* Dana, 101 U. S. 205;
Marsh *v.* Burroughs, 1 Woods, 464;
Holmes *v.* Sherwood, 16 Fed. Rep. 725;
Crawford *v.* Rohrer et al., 59 Md. 600;
In re Glen Iron Works, Bankpt., 20 Fed Rep. 674;
Sagory *v.* Dubois, 3 Sandf. Chy. 466, 492.

In Henry *v.* Vermillion, etc., R. R., 17 Oh. 187, it was said: "When a company * * * becoming insolvent abandon all action under their charter, the original mode of making calls upon the stockholders cannot be pursued. *The debt, therefore, from that time must be treated as due without further demand.*"

And in a like view it was, that on demurrer to petitions filed by the present defendant in error, and setting up facts substantially the same as appear in this case, in a number of suits brought by him in the Circuit Court for the Eastern District of Missouri, Judges Brewer and Treat,

after three elaborate arguments of the question, sustained the demurrers, and gave judgment for defendants.

Glenn *v.* Dorsheimer et al., 23 Fed. Rep. 696;
Glenn *v.* Dorsheimer et al., 24 Fed. Rep. 536;
Glenn *v.* Priest et al., 28 Fed. Rep. 908.

Speaking of the nature of the obligation, and the effect upon it of the assignment, it was there said [23 Fed. Rep. 696]: —

Brewer, J. "The obligation in the first instance is a conditional obligation. The stockholders are not to pay until a call has been made. As was suggested in the argument, these debts due by the stockholders to the corporation are its assets and furnish its means for transacting business, and, so long as the corporation is a "going concern," doing business, it may not need to have those obligations called in; and so, while it is a "going concern," I think it is fair to say, as is said by the Supreme Court of Mississippi" [referring to Payne *v.* Bullard, 23 Miss. 88–91], "that theirs is a conditional obligation, and that while the corporation continues to transact business, whether 5, 15, or 50 years, the stockholder's liability continues, and becomes absolute only after a call is made. But that is not this case, and the court in Mississippi draws the distinction very nicely. In 1866 this corporation ceased to do business; it ceased to be a going concern. It turned over its property, including the debts due from its stockholders, to the assignees to collect its debts, dispose of its property and pay its creditors. Whenever such a cessation of business occurs it seems to me fair to say that the liability of the stockholders becomes absolute — a fixed unconditional obligation."

Thompson on Stockh., § 291;
Payne *v.* Bullard, 23 Miss. 91;
Terry *v.* Anderson, 95 U. S. 636.

If the distinction suggested above, and maintained in the opinion quoted from, is a just one, then a cause of action for the whole of the unpaid part of the stock subscribed by the plaintiff in error, accrued to the trustees in the deed of assignment of 1866, upon the making of that deed, without any demand; and the statute of limitations began to run then, and the suit against him was barred long before is was begun.

But, even if that distinction is not well taken; and if we assume that after the assignment some demand of some sort was necessary to be made, before there would be technically a right of action for the debt, can yet the demand be made at any period of time, — no matter how remote — and till so made will the statute in no instance begin to run? Can the healthful benefit of a statute of repose be defeated by the failure of the creditor during years of delay to do that which alone is necessary to complete his right of action? May the assignee defer making, or having made, a demand, or call, for the debt, until witnesses have died, papers and records been lost and the memory of facts which would have constituted a defense become obliterated; and then, making it, deny the benefit of the statute to the defendant on the ground that no cause of action had accrued before? In this case no call was made till nearly five times the period, counting from the assignment, that would have barred the claim. If a call may be delayed that long, why may it not be delayed a century as well? If it may it is clear that there is a grave defect in the law.

But we are not willing to concede the existence of such defect. We submit that upon principle, and the authority of a number of adjudicated cases by several of the most respectable courts of last resort in this country, the beneficent operation of the statute could not be stayed during the long period between the assignment of 1866 and the decree

of 1880, by the mere neglect of the assignee to make a call or demand.

In such a case, at least, the principle applicable to ordinary cases of contracts to deliver property on demand, or to pay money so many days after demand, or to any others, the nature and terms of which show that the making of an actual demand was intended as a condition precedent to a right of action, will govern. In the case of such contracts, the principle is that the right of the creditor to make the demand, or do any other act necessary to be done in order to give him a complete cause of action, is itself limited to a reasonable time; and after the lapse of such a time for the exercise of the right, the statute will begin to run, whether the act was in fact done or not. What is the measure of such reasonable time depends on the circumstances of each case; but in the absence of good reasons to the contrary it will by analogy be fixed within the period by which the right of action, if demand had already been made, would have been barred. Measured by that rule, some call or demand should have been made by the trustees, or procured by them to be made by the directors, or a court within three years after the assignment of 1866. If so made and followed by an action within three years after its making, the right of action thereon would not have been barred. But not having been so made the right to make it ceased at the end of three years, and from that time, at least, the statute began to run, and the action was barred more than ten years before November, 1883. Or, if three years should be thought to be unreasonably short a time for the trustees to cause the call to be made, then at the end of such other time as was reasonable, say six or even nine years, the right would cease and the statute begin to run.

This principle is noted by Mr. Angell in his work on Limitations (6th ed.) at p. 95, § 96; and it is more

especially announced, and applied, in the following cases, viz. : —

Codman *v.* Rogers, 10 Pick. 119 (1830);
Baker *v.* Atlas Bank, 9 Met. 198 (1845);
Laforge *v.* Jayne, 9 Pa. St. 410 (1848);
Pittsb. & C. R. R. Co. *v.* Byers, 32 Pa. St. 22 (1858);
Pittsb. & C. R. R. Co. *v.* Graham, 36 Pa. St. 77 (1860);
Morrison's Admr. *v.* Mullin, 34 Pa. St. 12, 17 (1859);
Shackamaxon Bank *v.* Disston, 20 W. N. C. 297 (1887);
Franklin Savgs. Bank *v.* Bridges, 20 *Id.* 43 (1887);
Baker *v.* Johnson County, 33 Iowa, 154 (1871);
Prescott *v.* Gosner, 34 Iowa, 175 (1872);
Hintraeger *v.* Hennessy, 46 Iowa, 600 (1877);
First Nat. Bank *v.* Greene's Estate, 64 Iowa, 445 (1884);
Palmer *v.* Palmer, 36 Mich. 488 (1877);
Wright *v.* Paine, Admr., 62 Ala. 340 (1878).

Thus in Codman *v.* Rogers, 10 Pick. 119, the Supreme Court of Massachusetts, in 1830, in a suit in equity for an account, where a demand prior to suit was necessary and had been delayed seventeen years, after stating the law of limitation as to debts payable on demand, and noting the distinction between those in which no demand was requisite to the accruing of the cause of action, and those in which an actual demand was essential, said: —

"But in the latter case there must be some limitation to the right of making a demand. A party must not be permitted to sleep over his rights to the prejudice of the party on whom he makes a claim, and who by the delay may be deprived of the evidence and means of effectually defending himself. If no cause for delay can be shown it would seem to be reasonable to require the demand to be made within

the time limited by the statute for bringing the action. *There is the same reason for hastening the demand, that there is for hastening the commencement of the action; and in both cases the same presumptions arise from delay.*"

In Laforge *v.* Jayne, 9 Pa. St. 410, the Supreme Court of Penna., in 1848, applied the doctrine to a right of action upon a promise to return the plaintiff $172 in "Pike county checks" on demand, holding, that if it was a promise to return chattels (as to which an actual demand is essential to a cause of action), then the demand must be made within six years from the making of the promise, and that therefore since no demand had been made till fourteen years after the promise, though within six years before suit, the action was barred by the statute.

The same court has since repeatedly applied the principle to the other obligations which by their nature contemplated an actual demand before suit.

In two cases, decided in 1858 and 1860, while Judge Strong was a member of that court, it was applied to the right of action of a corporation against its stockholders for installments of stock on which no call or demand had been made within six years of the subscribing. These were the cases of P. & C. R. R. Co. *v.* Byers, 32 Pa. St. 22, and P. & C. R. R. *v.* Graham, 36 Pa. St. 77. The stock, by the terms of subscription, was payable at such times as should be determined by the directors. No calls were made until six years and over after subscription, but suits were begun in less than six years after they had been made. It was held they were barred, the court saying [32 Pa. St. 22]: —

"All the reasons that can be urged against enforcing any stale claim will lie against such a subscription. It is only a simple contract. Many circumstances may afford a defence against it. The policy of the statute is that all such contracts shall be enforced within six years, before witnesses are dead, papers lost and the means of defense gone. * * * We hold, therefore, that the company was bound to de-

mand payment of the subscription within six years from its date, or at least to call in an installment within that period."

In Morrison's Admr. *v.* Mullin, 34 Pa. St. 12, it was again applied to a suit of a sheriff to recover money,— part of the proceeds of a sale under execution of certain land of one Byers — paid over to him by one claiming a lien on the lands and to be therefore entitled to the part so paid, the claimant at the time of its payment promising in writing to refund it, if, on a settlement of the liens on Byers' interest in the land, it should turn out that he was not entitled to it. Sixteen years after the payment, it was decided, in suits brought by other claimants against the sheriff, that the money belonged to them, and not to the claimant (Morrison), to whom it had been paid; but the sheriff had in the meantime done nothing to have M.'s right settled, and M. was not a party to the suits of the other claimants. Within less than six years after the decision in those suits the sheriff sued M. on his promise to refund; but it was held that he was barred; that as in R. R. *v.* Byers, *supra*, it was requisite that the act of making a demand which was necessary to the accruing of the right of action should be made in six years after the promise, so there the act of having the question of M.'s right to the money settled was essential to be performed within six years; and, having been delayed beyond that period, it could not thereafter be done with effect, because lost, and from the end of that period the statute began to run, and so his suit was barred.

The court, in its opinion, said: —

"To give effect to the spirit of the statute the law sometimes, in the absence of stipulation by the parties, fixes the time, when the cause of action shall be taken to have occurred, by the duty of diligence required of the party. Where the time for doing an act necessarily precedent to bringing suit is indefinite, it allows a reasonable time. When that reasonable time has elapsed, the duty of

diligence begins. And if this consists in the assertion of a legal right, then is the time from whence the statute should begin to run. There would be no reason for delaying its operation, unless found in the nature or terms of the transaction. * * * In the case in hand it is obvious that to entitle the plaintiff to call for a return of the money he was to become the actor, and to procure a settlement of the rights of distributees of the money made on the sale of the land. This is the place he assumed to occupy with Morrison. He did nothing towards it within six years, and we think the application of the principle cited should bar him."

In the recent cases of Shackamaxon Bank *v.* Disston, 20 W. N. Case, 297, and Franklin Bk. *v.* Bridges, *Ibid.* 43, the Common Pleas Court of Philadelphia, and the Supreme Court of Pennsylvania, again (in 1887) applied the principle to suits on stock subscriptions, holding them barred if no call made in six years, thus following and re-affirming R. R. *v.* Byers, 32 Pa. St. 22, and other cases.

In 1877, the Supreme Court of Michigan, in the case of Palmer *v.* Palmer, 36 Mich. 487, in a very exhaustive opinion, concurred in by Judge Cooley, approved the doctrine of Codman *v.* Rogers, Morrison *v.* Mullin, and other cases, *supra;* and applied it to a suit on a note made in 1867, and "payable in thirty days *after demand*," which was brought in 1875, after a demand made in 1874 only. The bar of the six-year limitation act was pleaded, but overruled in the lower court, and judgment was given for the plaintiff. This was reversed by the Supreme Court, where it was said: —

"If the judgment is correct, it can only be so because by the terms of the contract the holder had a right to postpone the maturity of the debt as long as he chose to do so. For, if the debt did not become payable until fixed by demand, and the demand was optional with the creditor, no tender could be made which would bind him, and he could keep the debt alive in spite of the debtor for an

indefinite period. If there was any infirmity in the consideration, or any defect in the binding character of the obligation, he might retain it until all testimony was lost, and defeat the defense. This is the mischief which the statutes of limitation were intended to remedy. If this case is not within them it is not because it ought not to be covered by them."

And, after stating what had been held in Morrison *v.* Mullin, *supra*, it was further said: —

"We cannot but think this to be sound doctrine. * * * If a creditor has the means at all times of making his cause of action perfect, it would be unjust and oppressive to hold that he could postpone indefinitely the time for enforcing his claim by failing to present it. *He is really, and in fact, able at any time to bring an action, when he can, by his own act, fix the time of payment.* It is no stretch of language to hold, that a cause of action accrues, for the purpose of setting the statute in motion, as soon as the creditor by his own act, and in spite of the debtor, can make the demand payable. It may be otherwise, possibly, where delay is contemplated by the express terms of the contract, and where a speedy demand would manifestly violate its intent. But, where no delay is contemplated, the rule is just and reasonable; and the presentment should be reasonably prompt, or the creditor should be subjected to the operation of the statute."

The principle was applied, in 1878, by the Supreme Court of Alabama, in the case of a promise made in 1857 to return "whenever called for" a sum of gold then deposited by plaintiff with defendant for safe keeping, and where no demand had been made until 1869. Although six years had not elapsed after that demand, and before suit, and though it was held that a demand was necessary to create a right of action, the court decided that such demand was bound to be made in a reasonable time, that eleven years' delay was unreasonable, and that the statute had run,

and the suit was barred. As to when the demand should be made it was said: —

"The party bound to make it cannot postpone it indefinitely, and, by his procrastination, keep alive claims that would otherwise become dormant — the enforcement of which would be offensive to the policy of the law, and dangerous to the rights of his adversary."

In Iowa, also, the principle has been recognized, and applied, in a series of cases decided between 1871 and 1884.

It was first applied in the case of a creditor of a county, who delayed to present his demand to the supervisors until after the expiration of the limitation period, it being provided by an Iowa law, that no suit could be maintained on such claims until after such presentation. Held that the creditor's delay to so present it could not stop the running of the statute. This was the case of Baker *v.* Johnson Co., 33 Iowa, 154.

Next it was applied to a suit for *mandamus*, brought in 1870 against a county clerk to compel him to affix the county seal to a warrant, ordered to have been issued to plaintiff in 1864, and then issued, but without the seal on it; as preliminary to which suit, it was essential that there should have been a demand of the clerk, and a refusal by him to affix the seal. It appearing that no demand had been made till shortly before action was brought, and long after the expiration of the limitation period, counting from the issuance of the warrant in 1864, it was held that the action was barred; the court by Miller, J., saying: —

"It is certainly not the policy of the law to permit a party, against whom the statute runs, to defeat its operation, by neglecting to do an act which devolves upon him in order to perfect his remedy against another. If this were so, a party would have it in his power to defeat the purpose of the statute in all cases of this character. He could neglect to claim that to which he is entitled, for even

fifty years, unaffected by the statute of limitations, thereby rendering it a dead letter."

This was in the case of Prescott *v.* Gosner, 34 Iowa, 175.

It was also again applied in two later cases, of Hintrager *v.* Hennessy, 46 Iowa, 600, a suit in ejectment on a tax title where there was a delay in taking out the tax deed; and Bank of Garrettsville *v.* Greene's Admr., 64 Iowa, 455, a suit by a creditor of an insolvent corporation to enforce against a stockholder his liability, to the extent of his unpaid subscription, given by the Iowa statutes. The later case was one of large importance and was thoroughly argued. The suit had been brought more than five years after the corporation became insolvent, but less than that time after judgment had against the corporation and execution returned unsatisfied. It was held that the right of action against the defendant accrued when the corporation became insolvent, and that even if the obtaining judgment against the company were necessary to complete the right to sue, yet the creditor could not, by delaying to obtain such judgment, prolong the period of limitation fixed by the statute, and thereby stay its running and that plaintiff was barred. The several cases in Iowa, noted above, were reviewed, and this said as to the meaning of them: —

"*The ground of all these decisions is that a party holding a claim or right of action, may not be allowed to prolong the operation of the statute by refusing to take the steps which the law requires in order to authorize the maintenance of an action.*"

The doctrine of these cases we submit is a sound and reasonable one, and unless at war with other controlling authorities ought to govern in the decision of this case.

Surely it ought not to be allowed to a creditor who has a

claim payable on demand, to postpone the maturity of it indefinitely, by his mere neglect, or refusal, to make the demand. The less does it seem that he ought to be allowed so to do, where, as here, he was a trustee for the creditors of an insolvent corporation, vested with the title to the claim for the express purpose, declared in the deed, of collecting it speedily "without unnecessary delay," and when, as the representative of the creditors, he could, soon after his appointment, have sued the plaintiff in error directly by bill in equity without the necessity of a call.

Hatch *v.* Dana, 101 U. S. 205;
Ogilvie *v.* Knox Ins. Co., 22 How. 380.

The right to bring such suit in equity, had become barred long before the institution of this suit at law, but yet by means of the roundabout proceedings taken in Virginia, it is claimed that a right of action at law has been kept alive. That the direct and simple remedy in equity should be dead, and an indirect remedy, at law, be found alive after all these years, presents an anomaly in Jurisprudence whose very existence is a persuasive argument, that the right of action at law is barred also. In view of it, it is not strange that in his last opinion, delivered in the cases brought by Mr. Glenn in Missouri, Judge Brewer, said; [28 Fed Rep 908.]

"*I cannot escape the conviction, that no mere strategy of legal proceedings, should enable a party to jump the lengthened space of eighteen years, and destroy the beneficent effect of a statute of repose like the statute of limitations.*"

Or that he, in his first opinion, in them [23 Fed. Rep. 699] said that he did not think, that where the creditor in the first instance had an open, ordinary, direct and simple way of collecting his debt, he might follow any other way that he saw fit, and say, that although the statute of limitations would have cut off the simple and direct way, *yet it*

did not happen to interfere with the various steps pursued in the way around, to reach the stockholder.

That our jurisprudence ought not to be marred by such an anomaly, as the endowing the liability of the stockholders of insolvent corporations for corporate debts with immortality in courts of law, and yet limiting it to the usual periods of limitation after the company's insolvency in courts of equity, all will admit. And, if such is the law, it is plain that it ought not to be so. The application of the principle laid down in the cases from which we have quoted, will go far to remove the difference in the operation of the statute in the two systems of procedure.

But are there other cases, of any weight as authority, which deny the doctrine of the cases so cited by us? So far as a diligent search on our part has shown, there are none; except only such decisions as, within the past six years, have been made in other cases like this, brought by Mr. Glenn against other stockholders of this express company. Besides them, there have indeed been many cases, in which it has been held that the statute of limitations runs against the different installments of a debt, which by its express terms is payable at fixed times, and in named installments, from the time each falls due; or, that in the case of subscriptions to stock payable at times, and in sums as called for by the directors, it runs from the time of each call respectively. But a large number of them have been the ordinary cases of actions by the corporations themselves, while still going concerns, and not by assignees, or receivers of their assets after their insolvency. Others of them have been suits against members of mutual insurance companies upon premium notes, which, while by their terms payable "when called for by the directors," were yet held, because of provisions in the charters, or by laws, of the companies, to be obligations to pay only so much of the sums promised as should be needed to pay the losses and expenses of the companies, and to be contingent upon

there being such losses, etc., and not to be promises to pay upon demand merely. And others still have been suits in equity of creditors against stockholders directly, and where there had been no assignments by the companies. And in none of them had there been, after any assignment made, or cesser of business, by the company, any delay in the making of a demand, or call, upon the stockholder, for an unreasonable time, or during the period which, under the statute, would have barred an action. Nor in any of them,— except possibly, Taggart *v.* W. Md. R. R., 24 Md. 564, — was the principle suggested by us above, as to the effect upon the running of the statute of an unreasonable delay in the making of a demand, or call, discussed, or apparently, considered. All of them, therefore, while decisions of the questions which arose in them, and to be considered as such, are not applicable here, and are not antagonistic of the principle we invoke, and the cases we have cited in in support of it.

The cases, which are usually relied upon as applicable to the question of limitations, and as showing that no cause of action accrued on the debts until the call of December, 1880, will probably be cited in the brief of the defendant in error. They are numerous, and, unless examined with care, are likely to confuse. What we have stated as to them will, however, be found correct. Of them the cases of Hemp *v.* Garland, 4 A. & E. (N. S.) 519; Burnham *v.* Brown, 23 Me. 400; and Bush *v.* Stowell, 71 Pa. St. 208, will be seen to be suits, not on stock subscriptions at all, but on other debts, payable in installments, of named amounts, at fixed times, and as to which it was held, that the statute ran upon each installment as it fell due; a proposition not disputed at all, but not bearing on the question arising here.

The case of Salisbury *v.* Black, 6 H. & J. 293, referred to sometimes in some of the other cases relied on by defendant in error, was also not a suit on a stock subscription, but an action of debt on a penal bond, given by a

legatee to an executor, conditioned to refund money advanced him on his legacy, in case a deficiency of assets of the estate should actually happen. The estate was not finally settled, and no deficiency of assets actually happened, until seventeen years after the giving of the bond. It was held that the statute did not begin to run until the final settlement. This was no case of a debt payable on demand, or of failure of the creditor to do anything in his power necessary to give to him a right of action, and has no application here.

The cases of Western R. R. *v.* Avery, 64 N. C. 491; Balt., etc., Tp'k. Co. *v.* Barnes et al., 6 H. & J. 57; Taggart *v.* W. Md. R. R., 24 Md. 564; Sinkler *v.* Turnpike Co., 3 Pa. 149; P. & C. R. R. Co. *v.* Plummer, 37 Pa. St. 413; Ross *v.* Laf. R. R. Co., 6 Ind. 297; Breedlove *v.* Mart. R. R., 12 Ind. 114; Gebhart *v.* Junc. R. R., 12 Ind. 484; Miss., etc., R. R. *v.* Gaster, 20 Ark. 455; Macon & Aug. R. R. *v.* Vason et al., 52 Ga. 326, and Gibson *v.* Columb., etc., Bridge Co., 18 Oh. St. 396, were all suits by "going concerns," for money due on stock subscriptions. In some of them the time of the debt coming due was expressly fixed by the terms of the subscription, that is as payable in named installments at fixed times, and all that was decided was that the statute ran, as to each such installment, from the time it fell due. Such was the case of Balt., etc., Tpk. Co. *v.* Barnes, *supra*. In others of them the actions were for calls made by the directors, the stock being payable in amounts and at times as called for by them. In most, if not all, of the latter, the calls were made within less than periods which would have barred suits; but, since they were made while the companies were still viable, that is immaterial so far as the case at bar goes. The decisions in all of them were, that the statute ran from the making of the calls. No question as to delay in the making of the calls was raised. Such were the facts in Western R. R. *v.* Avery, 64 N. C. 491;

also in Sinkler *v.* Turnpk Co., 3 Pa. 149, both of which are specially relied on by defendant in error. In Gibson *v.* Columbia, etc., Bridge Co., 18 Ohio St. 396, the suit was on a call made twelve years after subscription, but by a going Company, and also within the period of limitation, which in Ohio was fifteen years. No question of delay in the making of the call was raised.

The cases of Hope Ins. Co. *v.* Mead, 28 Conn. 51; Savage *v.* Medbury, 19 N. Y. 32; Sands *v.* St. Johns, 36 Barb. 635; Sands *v.* Annersley, 56 Barb. 598; Sands *v.* Lilienthal, 46 N. Y. 54; Howland *v.* Cuykendall, 40 Barb. 320; Warner *v.* Beem, 36 Iowa, 386; Long Pond Ins. Co. *v.* Houghton, 6 Gray, 77; Pendergast *v.* Commercial Ins. Co., 15 Gray, 260; Appleton Ins. Co., *v.* Jesser, 5 Allen, 446, and Bigelow *v.* Libby, 117 Mass. 359, were none of them suits against stockholders, but were all against members of *mutual* insurance companies on premium notes given for policies issued to them. The notes were, by their terms, payable "in such portions, and at such times as the directors may, *agreeably to their charter and by-laws*, require," or similarly. Owing either to provisions in the charters or by-laws, or to the nature and plan of the business carried on by the companies it was held that the notes were to be construed only as agreements to pay the makers' proportion of the aggregate sums requisite from time to time to meet the losses and expenses of such companies, and upon assessments of such losses and expenses made upon all the members, and not as absolute promises to pay the whole amounts of them when required by the directors, regardless of such losses. In other words they were held to be merely conditional promises to pay so much as would be necessary — not exceeding the sums named in them — *in case* there were losses sustained for which their payment would be needed, and when an assessment and call should be made by the directors for that purpose; and not promises to pay independent of any condition except a demand made at the will of the directors.

In determining that such was their meaning the courts did not look alone at the words "payable at such times and in such portions as the directors may require," but also (and more), at the provisions of the charters and by-laws of the companies, and at the general purpose of the companies' being, and the nature of the business (mutual insurance) carried on by them. And in some cases, where exactly the same language was used in notes given to like companies, it was held by the same courts that by reason of the circumstances under which they were given, those notes were not dependent for their falling due, upon there having been losses, or an assessment, but that they were absolute promises to pay without regard to any assessment or call; that their language (as above) was not inconsistent with an absolute promise, and could as well be used for one class of promises as the other. This was especially shown in the case of Howland *v.* Edmonds, 24 N. Y. 310, where a note so payable (*i.e.* at such times, etc., etc.), was held to be an absolute promise, payable on demand, *and due at once;* and where the distinction between it and those in suit in Savage *v.* Medbury, 19 N. Y. 32, and other like cases (cited by defendant in error as above), holding notes of similar phraseology to be conditional, was ably explained. Speaking of the notes in such other cases it was there said (p. 310): "In these cases *the circumstances outside of the notes*, and connected with their consideration attached a meaning and purpose to the peculiar expressions contained in them. Those circumstances, looked at in connection with the terms of the notes, showed that they were not made for the absolute payment of the sum of money mentioned in them, or of any sum, *but as an agreement to pay a proportion of the losses which might belong to the makers to pay, not exceeding the nominal amount mentioned in the notes, when an assessment for that purpose should be made by the directors.*" Like distinctions were drawn, and reasons given in White *v.* Haight, 16 N. Y. 321, and Long Pond Ins. Co. *v.* Houghton, 6 Gray, 77, where, also, notes

of similar phraseology were construed to be absolute promises. Thus, then, it is apparent that the obligation of the contracts involved in this class of cases — although they were couched in similar language to that of the contract of subscription involved in the case at bar, was of a very different nature from that of the latter.

They were clearly contracts for the payment of money, the maturing of which was conditional, not merely on the will of the corporations, or their directors, but upon what was beyond the will of the directors, namely, the happening of losses and expenses making it necessary that it should be paid. The rulings, therefore, as to the time of the accrual of the cause of action, and the running of the statute, found in them, cannot apply to the case at bar, where the contract was, in effect, one due on demand only.

Besides, in none of this class of cases does it appear that there was any unreasonable delay in making the demand, or the calls, or assessments, sued on, and the question now raised here was not considered or decided.

Kilbreath *v.* Gaylord, 34 Oh. St. 305; Allibone *v.* Hager, 46 Pa. St. 48; Moses *v.* Ocoee Bank, 65 Tenn. 398; Hightower *v.* Thornton, 8 Ga. 502, and Cherry *v.* Lamar, 58 Ga. 541, were direct suits in equity by creditors against stockholders. In none of them, except 8 Ga. 502, had there been a severance of the relation of the corporation to the stockholder in respect to the unpaid debt by means of any assignment to a trustee for creditors; and in none was the effect of an unreasonable delay by an assignee, or receiver, to make a call decided.

The cases of Turquand *v.* Kirby, 4 Eq. (L. R.) 123; Chandler *v.* Keith, 42 Iowa, 99; Chandler *v.* Siddle, 3 Dill. 477; Liquidator of C. & P. H. R. R. *v.* Eason, 14 La. Ann. 816, 819; Gt. Western Tel. Co. to use, etc. *v.* Gray, 122 Ill. 630, and Scoville *v.* Thayer, 105 U. S. 143, were suits by receivers or assignees. In four of them it was held that they were not barred because begun within the statutory

period after the call had been made. The question of what effect an unreasonable delay in making a call or demand after an assignment or appointment of a receiver was not decided in them.

In Liquidator C. & P. H. R. R. *v.* Eason, 44 La. Ann. 816, 819, the date at which the corporation was put into liquidation, is not very plain in the report. On page 819 it is said to have been 1843. A call was made in 1852 [p. 818], nine years afterwards. This was less than the statutory period for limitation of an action, namely, ten years. Action was begun in 1853. It was held the action was not barred. The question of effect of a delay of more than ten years in making the call was not considered or decided.

Scoville *v.* Thayer, 105 U. S. 143, relied on as decisive here, we respectfully submit is not so. Under the peculiar facts there involved it was held that the right of action of the assignees in bankruptcy did not accrue until the proceedings taken by them had resulted in an order of the bankruptcy court determining how much was required to be paid in by the stockholders, and directing them to collect it, and that, as the suit was begun within two years after that order, it was not barred by the two years' limitation of the bankruptcy act. But an examination of the opinion will show, that it was because of an agreement by the company with the stockholders that the stock should be held as full paid after payment of twenty per cent thereof, and the necessity for setting that aside, that it was held that no cause of action accrued until the order was made. The reasoning in the opinion was that since the assignees, as representing the company had no right to sue at all because of the agreement, and as representing the creditors, had no right to sue at law until the agreement was set aside, and then only for so much as would, after the exhaustion of the other assets be needed to pay the debts, it was necessary before they could sue the stockholders to

have the agreement annulled, and the amount needed to pay the debts determined by the judgment of the court; that both objects were accomplished by the proceedings brought by them, and the order made thereon [p . 156], and so, that the right of action accrued then, and not before. The need for the setting aside of the agreement as a condition precedent to their right of action was repeatedly emphasized in the opinion [pp. 155, 156 157 and 158], and the case of Terry *v.* Anderson, 95 U. S. 62, in which the right of action against the stockholders of a bank had been held to have accrued upon the bank's failure, was distinguished on the ground that there there had been no such agreement by the bank with the stockholders, for the setting aside of which any such order was required. [p. 157.]

The general proposition that the right of action upon stock subscribed to be paid upon call of the company, accrues from the time of the call as made by the company, or by a court of equity, was stated, and some of the cases already referred to by us were cited, [p. 155]; but what was so said was *arguendo* merely, and, we submit, without any purpose to decide what would be the rule in case of a call, or demand, delayed unreasonably or beyond the period limiting the right of action, as in the case at bar.

It appeared in the case that the petition of the assignees to the court for the order fixing the amount to be collected from stockholders had been filed within the two years from the commencement of proceedings in bankruptcy prescribed by the law as the limit for suits, and that it could not have been presented earlier because of the condition of the estate; also that after it was presented it was prosecuted as expeditiously as possible, and with diligence, and that such delay as there was, was caused by the opposition of stockholders. Attention was called to these facts in the opinion, and it was said that such delay ought not to be taken advantage of by the stockholders to escape liability; and especially that it was not for the defendant to say, that " while the steps necessary to fix his liability, and limit its amount,

were being taken the bar of the statute had intervened, and cut off his liability altogether." [p. 157.] Not a word was said indicating that such proceeding could have been postponed by the assignees indefinitely, or that where a call or demand was delayed unreasonably, the statute would not begin to run. On the contrary it is to be inferred from what was said as to the diligence shown by the assignees, that in the court's opinion diligence was required, and but for its appearing to have been exercised there, a different conclusion might have been reached.

In the case at bar there was no agreement to be set aside, and the assignees were guilty of the greatest negligence, taking no steps for seventeen years.

The decisions rendered bya number of the Circuit Courts of the United States, and by the courts of last resort of Maryland, Virginia and Alabama during the past six years, in other cases like this brought by defendant in error, and now relied on against us,— especially in Glenn *v.* Williams, 60 Md. 122; Glenn *v.* Semple, 80 Ala. 160, and Vanderwerken *v.* Glenn, 6 S. E. Rep. 808, — do not, we submit, contain any persuasive reasons for the conclusions reached in them. In none of them is the point of distinction urged by us here, and sustained by the cases which we have cited, noticed, nor is any allusion made to the existence of those cases. The facts involved were the same as here, and under them the question could have been raised; but the opinions announced do not indicate that any attention was given to it. The only authorities cited in them in support of the views adopted, were some of those to which we have referred above, and whose inapplicability we have explained. Those so cited were, chiefly, Scoville *v.* Thayer, 105 U. S. 143; Sinkler *v.* Tpk. Co., 3 Pa. 149; Balt., etc., Tpk. Co. *v.* Barnes, 6 H. & J. 57; Western R. R. *v.* Avery, 64 N. C. 491, and a number of the cases on premium notes of mu-

tual insurance companies, such as Savage *v.* Medbury, 19 N. Y. 82, and like cases, to which we have already referred. We have stated why we insist that none of those cases, either in their facts, or in the principles adopted in them, come up to the case at bar. If our views as to their inapplicability are correct then so far as authorities to sustain the decisions there made go, they are virtually unsustained.

As respects the reasons given for the conclusions reached in those decisions, they seem chiefly to be that the obligation of the stockholder was a conditional, or contingent one; and that until the condition arose, or the contingency happened, there was no cause of action. To this we say, as before, that the only condition of the obligation, was one relating to the time of its payment, and, as to that, subject to be determined at any time by the will of the corporation; that the obligation was conditional only in the sense that any promise to pay on demand is, and that therefore in determining when the statute would begin to run upon it, the same rules would, after the assignment by the company and its cessation of business, at least, apply, as are applicable to other debts payable on demand. And applying those rules a very different conclusion would be reached from that arrived at by the learned courts in the decisions mentioned.

The evidence does not warrant the view that there was any further condition to the obligation, such as the existence of a need for the money demanded, in addition to the mere exercise of the will to demand it. The words "the residue payable as required by the president and directors" do not import any such condition.

In Glenn *v.* Semple it is given as a reason why the statute, notwithstanding the long delay in making demand, should not run, that the duty of making it belonged to the directors, and that, they being the agents of the stockholders, the latter should not be permitted to claim the advantage of their neglect.

This argument, we submit, would lead to the conclusion that the stockholder could not plead the statute in any case: for the directors being also bound to collect debts due the company, and yet agents of the stockholders, the latter ought not to be allowed to set up either the neglect of their agents in bringing suits, any more than their neglect in making calls.

We submit the argument is fallacious: that the directors are the agents of the corporation — the creditor, and not of the stockholder — the debtor, in respect of the duty of making calls, as well as in that of collecting them.

We submit that the several decisions in the like cases to this, that the statute did not begin to run until 1880, by no means meet the question now raised and the cases we cite in support of it; and that the reasoning in them is based upon a wrong theory of the nature of the obligation of the stockholder and ought not to be adopted here.

Assuming that the principle established by the cases we have cited is held to be sound, the facts abundantly warrant its application. The trustees, under whom Glenn derives his right, could easily have done all that was done by the creditors in 1879–1880, towards having a call made — if any was necessary — as early as 1867 or 1868; and have gotten a decree ordering it in eighteen months after 1866, or earlier. The creditors, after they began to proceed actively in 1879, obtained a decree within eighteen months.

But instead the trustees did nothing at all, began no suits either against the stockholder directly in equity, or against the company and directors to have a call made. It does not appear a demand even was ever made by them. Nor were the creditors much more diligent even if their activity could be credited to the trustees. They delayed five years — two years more than the statutory period in North Carolina — before even filing a bill. And when it was filed they did not sue out process against the company for nearly eight years

more. In the summer of 1879 only did they proceed with their suit. Till then it was left to sleep. Finally in 1880, the removal of the trustees was secured and a call ordered by the court. More than four times the statutory period in North Carolina for bringing suit had then expired since the assignment to the trustees. Under the principle of the cases cited by us a delay of less than half this time to make demand was enough to set the statute in motion; and under it, and the facts, we submit it began to run at least as early as 1876, and that the plaintiff's action, begun in 1883, was therefore barred as early as 1879.

Even if it were held that the unreasonable delay of the trustees in having a call made by the directors, or the court, did not set the statute in motion, yet we submit that it began to run at the time of the deed of assignment in 1866, because that deed was itself a sufficient call for all the unpaid stock.

"A call is nothing more than an official declaration that the sums subscribed are required to be paid. And a direction to collect such sums necessarily involves such a declaration."

Braddock *v.* P. M. R. R. Co., 45 N. J. L. 364.

And a resolution directing the president to "take such proceedings toward the collection of subscriptions as would most speedily accomplish the object," was under the above definition held by the Supreme Court of New Jersey in 1883, to be a call. *Idem.*

And a mere demand by the assignee for creditors is held in Pennsylvania a sufficient call.

Yeager *v.* Scranton Tr. Co., 14 W. N. C. 296.

And in Missouri an assignment of all property of a corporation, where the stock by the provisions of statute was

payable as called for by directors, was held to convey uncalled subscriptions, and to give the assignee the right to sue for them.

Shockley *v.* Fisher, 75 Mo. 501, 502;
1 Rev. Stats. 1879 of Mo., § 738;
Eppright *v.* Nickerson, 78 Mo. 488.

The assignment of 1866 was authorized by a resolution of the directors [Pr. Rec. p. 60] and as such was an official declaration by them, that the unpaid stock subscriptions conveyed thereby were required to be paid. It expressly conveyed them to the trustess in trust to *collect* them *without unnecessary delay;* the language being thus: —

"Secondly that the trustees shall proceed without unnecessary delay to collect *all the debts, claims and moneys payable*, which are hereby granted or assigned." [Pr. Rec. 25.]

This was certainly much stronger evidence of an official declaration that the sums subscribed are required to be paid than occurred in Braddock *v.* R. R., *supra.*

The order is to collect *all*, thereby meaning the whole unpaid subscriptions. The deed provided that any overplus collected, after paying debts, should be paid over to the corporation [Pr. Rec. 26]. Under this we see no reason why the trustees, if they had wished, could not have sued stockholders at once without further call, or any proceeding in equity. The directors had the power to call what they pleased, and they indicated their design to exercise their power and call *all* by the adoption and execution of the deed.

The decree of the Richmond court was not a bar to the defense of the statute of limitations in this suit against the plaintiff in error in North Carolina.

Assuming even that he was in any sense a party to the

suit in which it was rendered the matters in issue there were not those in issue in the later suit. The cause of action to which limitation could have been pleaded there was not the same as in it. The allegations of the pleadings, and the relief sought, as well as the parties, were wholly different. In the former the object sought was to establish a deed of trust, remove trustees, appoint a new one, and secure an order for a call on stockholders, who ever they might be. It was not to adjudge that plaintiff in error, particularly, was a stockholder, or what amount of stock he held, or whether it had been full paid or not, or had been forfeited, surrendered, or released or not, or whether there was any other ground for not charging him in particular, or not. Those were all matters that might be brought in issue in such direct suits as might be afterwards brought against such persons as the new trustee under that decree, conceiving to be stockholders, might bring. But they were not in issue in the suit resulting in the appointment of that trustee. To obtain repose as against a litigation about them, the persons so sued by him could plead the statutes of the particular jurisdictions in which they might be brought, although they might, and generally would, be different from the statute of limitations of the jurisdiction in which the suit resulting in that decree had been brought. Accordingly the plaintiff in error, by virtue of the laws of North Carolina, was entitled, in the suit there brought in 1883, seeking to charge him as a stockholder owning two hundred and fifty shares of stock, to claim the benefit of the lapse of three years after the accrual of the cause of action there set up, as against that cause of action. He could not have claimed it in Virginia in the suit there brought even if that suit had been for the same cause of action. But being for a different cause of action he, in any event, could claim it. His right to the benefit of the statute of limitations was not adjudicated by the court of Virginia, where only the limitation of five years under the statutes of Virginia could have been pleaded.